# CHAPTER XI.

## PRE-EMPTION.

### § 1.—Terms : Operation of Pre-emption.

I. Terms defined.

**522.** (1) "Pre-emptor[1] means a person[2] having or claiming the right to get any property transferred to himself,[3] on his paying the consideration for which the owner[4] of the said property has, or is alleged to have sold or bartered or has purported, or agreed, to sell[5] or barter[6] it to another. The said right or claim is called the "right (or claim) to pre-empt."[7] The said property is referred to as the "subject of pre-emption"[7] or "the pre-empted property," or "the land pre-empted."[7]

Pre-emptor : pre-emption.

Subject of,—

(2) In this chapter unless it otherwise appears,

(*a*) The subject of pre-emption is called "the property" or "the land"; its original owner[8] "the seller or vendor";[9]

land, seller, vendor, or buyer.

[1] The pre-emptor may be a co-sharer (= *sharik*) (s. 541 A), or participator in appendages (= *khalit*) (s. 541 B) or neighbour (= *jar*) (s. 541 C); see definitions in ss. 541 A-C, pp. 707 f. & in Punjab Pre-emption & Oudh Laws Acts : pp. 726 ff., s. 557.

[2] Masculine includes feminine & singular includes plural, & *vice versa*.

[3] PRE-EMPTION = right not of repurchase from seller or buyer : but of substitution : entitling pre-emptor to stand in shoes of buyer. Agra Pre-emp. Act (Local) XI. of 1922, s. 4 : decree for pre-emption is not a re-sale : pre-emptor not representative of & does not for purposes of Limitation Act IX. of 1908, s. 19, derive title through buyer : *Shankar Lal* v. *Hashmi Begam*, (1932) 54 All. 1023. WANT OF MUTUALITY : see p. 665, n. 5, s. 523.

[4] JOINT OWNERS OR SELLERS : Hed. 564 ; Bail. I. 492 (498) ; *Muhammad Askari* v. *Rahmatullah*, [1927] 25 All. L. J. 473, 478.

[5] Not *hiba bil iwaz* for *mahr* : *Bashir Ahmad* v. (*Mt.*) *Zubaida Kh.*, (1925) 1 Luck. 83 : *Sheikh Mohammad Jamil* v. *Khub Lal Raut*, (1920) 5 Pat. L. J. 740 (pre-emption applies only to SALE OF PROPRIETARY INTEREST & therefore not to sale of *muqarrari* interest) : see ss. 526-526 B, *nn.*, pp. 678-681.

[6] Texts refer both to SALE & EXCHANGE, but for brevity only sale is referred to throughout, & that expression must be taken to include exchange or barter.

[7] Bail. I. 471 (475). Pre-emption = *shufa* in Arabic ; pre-emptor = *shafi*, Mahmood, J., suggested "servient tenement" = subject of pre-emption : *Jai Ram* v. *Mahabir Rai*, (1885) 7 All. 720, 728 ; see *Jadu Lal Sahu* v. *Maharani Janki Koer*, (1912) 39 I. A. 101 = 39 Cal. 915.

[8] I.e. owner who has agreed or purported to sell property.

[9] Where there are JOINT PURCHASERS there are supposed to be as many sales : *Muhammad Askari* v. *Rahmatullah*, [1927] 25 All. L. J. 473, 477 ; citing *Durrul Mukhtar*, (B. M. Dayal) 399 (Luck. 1913, 1916) ; *Aliman B.* v. *Ali Husain*, (1923) 45 All. 449 (where more purchasers than one, demand must be made in presence of all).

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the person to whom it was originally intended to be transferred by sale or barter "the buyer, purchaser or vendee"; [10] the agreement for its transfer "the sale," or the "ground for pre-emption"; its consideration (in money or property), the "purchase money" or "the price"; and the right of pre-emption is said to be "claimable on" or to "arise from" or to be "based on" the sale or the ground of pre-emption.

Sale.

Price.

Right of pre-emption arising.

(*b*) Two or more persons simultaneously entitled to pre-empt the same property, are said to be on the same footing in respect of the priority of their claims to pre-empt, or "equal in degree in respect of pre-emption" [11] or "joint pre-emptors." [11]

Pre-emptors equal-in-degree; joint-pre-emptor

(*c*) Where the right of one person to pre-empt arises only in the absence, or on the disqualification, of another, or on that other waiving or forfeiting his claim to pre-empt, the latter is (subject to his disqualification or waiver or forfeiture) said to have "priority in the right to pre-empt" over the former,[12] or to be "the prior pre-emptor."

Priority in the right.

(*d*) A person whose personal law includes the law of pre-emption, is said to be "governed by" or "subject to the law of pre-emption." [13]

Persons governed by.

(*e*) The talab-i-muathibat, talab-i-ishhad, and talab-i-tamlik, as explained in ss. 528-528 C, are respectively called the "assertion," [14] "demand," and "enforcement" of the claim to pre-empt,[15] or the first, second, and third claims; the first two of these are referred to as the "preliminary ceremonies;" and the pre-emptor is said respectively to assert, demand, and enforce, his claim.

Talab-i muathibat (or assertion).

Talab-i-ishhad (or demand).

Talab-i-tamlik (or enforcement)

(*f*) The wajibu'l-arz is the record of the information

Wajib-ul-'arz or record of tenures, &c.

[10] *Original* sometimes added out of greater caution, to distinguish buyer or vendee from pre-emptor: since the pre-emptor becomes the final buyer.

[11] *Syeeduddin* v. *Latifunnissa*, [1921] 19 All. L. J. 909 (degrees of nearness between same class of pre-emptors not recognized). Cf. s. 545, pp. 714 f.

[12] Civ. Pro. Code, 1908, O. xxv., r. 14(2)(*b*) speaks of SUPERIOR & INFERIOR PRE-EMPTORS.

[13] PERSONS GOVERNED IN INDIA BY LAW OF PRE-EMPTION are: (*a*) all Muslims (except residents of places where Courts refuse to enforce law of pre-emption on ground that it is against public policy, or that it has fallen into desuetude); (*b*) those who have adopted it by custom; or (*c*) by contract: *Hamedmiya* v. *Benjamin*, (1928) 53 Bom. 525, 539 f.

[14] "The first formality technically called the *immediate demand*": *Jadu Lal Sahu* v. *Maharani Janki Koer*, (1912) 39 I. A. 101 = 39 Cal. 915.

[15] Where necessary, Arabic equivalents are given, or they are referred to by number, e.g. first assertion: second demand.

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Custom and wajib-ul-'arz altering Muhammadan law.

(3) The rules stated in this chapter represent the general Muhammadan law. The said rules may be altered by custom.

(4) Rights of pre-emption claimed under a wajibu'l-arz, are governed, in the first instance, by its construction.

1.—Basis of right to pre-emption.

"The right of pre-emption is founded on contract and neighbourhood, confirmed by talab or demand, and ishhad, or invocation; and is perfected by taking possession."[17]

2.—Procedure.

The exposition of the procedure on a suit for pre-emption before the Kazi[18] represents in a compendious form a statement of all the matters and constituents establishing the claim.

3.—Definitions of pre-emption.

a.— "Shafa or pre-emption is defined in the Sharaiu'l-Islam as "the legal title of one partner in joint property to the share of another partner in consequence of its transfer of sale;"[19] by Mahmood, J., as "a right which the owner of certain immovable property possesses as such for the quiet enjoyment of

c.— immovable property, to obtain in substitution for the buyer, proprietory possession of certain other immovable property not his own, on such terms as those on which such latter immovable property is sold to another person."[20]

The Punjab Pre-emption Act, 1913, and Oudh Laws Act, 1876 define it as

b.— the right of persons mentioned or referred to, to acquire, in the cases

[16] *Chowdhree Brij Lal* v. *Raja Goor Sahai*, (1867) Agra (F. B.) (N. W. P., F. B. RUL. July-Dec. 1867), 95 (ORIGIN & EFFECT OF WAJIBU'L-ARZ explained in great detail); *Sadhu Sahu* v. *Raja Ram*, (1893) 16 All. 40 (F. B.); *Returaji Dubani* v. *Pahlwan Bhagat*, (1910) 33 All. 196, 204, 206 (F. B.); (*Mt.*) *Lali* v. *Murlidhar*, (1906) 33 I. A. 97 = 28 All. 488, 492; *Murtuza Hussain* v. *Mohammad Yassin*, (1916) 43 I. A. 269, 283 (OU.). WAJIBU'L-ARZ, lit. = fit for, or worthy of, representation; petition, written statement or representation, written agreement: in N. W. Prov. is considered to be most important of documents relating to village administration, describing (i) established mode of paying Gov. revenue, (ii) actual shares or holdings, (iii) whether held in severalty or in common, & how separation or re-allotment takes place, (iv) powers & privileges of *lambardars* & how elected, (v) what extra items of collection recognized, (vi) rules regarding fruit & timber trees on estate, & (vii) how irrigation maintained, (viii) appropriation of waste lands, (ix) village servants & fees, & pay of the village watchmen: it should be, in fact, complete view of organization of village & to be attested by (1) signatures of all *lambardars*, & (2) as many of shareholders as choose to sign, & (3) by signatures of *patwari* & *kanungo*, (4) it should be read aloud in open court in hearing of subscribing parties, & settlement officer, (5) & be approved & signed also by him. Term seems superseded of late years by *khewat*.—Wilson, *Glossary*, (1855). On evidentiary value of *wajibu'l-arz* see *Fazl Hussain* v. *Muhammad Sharif*, (1914) 36 All. 471. It may be rebutted: *Digambar* v. *Ahmad*, (1914) 42 I. A. 101 (ALL.).

[17] Bail. I. 481 (487), cf. Bail. I. 485-487 (491-493).

[18] Bail. I. 485-487 (491-493), Bk. VII. ch. 3.

[19] Bail. II. 175: under Hanafi law a partner not only in the property, but also in its rights, & also a neighbour, have a legal claim to pre-emption, *ibid. n.* 1, citing Bail. I. 476 (481).

[20] *Gobind Dayal* v. *Inayatullah*, (1885) 7 All. 775, 799.

specified, certain classes of immovable property in preference to all other persons. The term has been more briefly defined as the right of purchasing property before, or in preference to, other persons.[21] SECTION 522. d.—

Imam Shafii held pre-emption to be "repugnant to analogy, as it involves the taking possession of another's property contrary to his inclination; whence it must be confined solely to those to whom it is particularly granted by the law."[22] It is justified, however, on the grounds that: (*a*) so far as a joint owner is concerned, it is injurious to him to have a stranger as participator in the property to which he must be attached through associations, but which he may perhaps abandon: and that it would be a greater hardship on him than on the stranger: the more so as the stranger is compensated; (*b*) inconveniences attend the division of property;[23] (*c*) the Sharaiu'l-Islam refers to division occasioning loss or damage as a cause why the right is given;[24] and (*d*) the Hidaya, to pre-emption "being a disseising another of his property merely in order to prevent apprehended inconveniences"; and (*e*) that "the grand principle of shafa is the conjunction of property and its object...to prevent the vexation arising from a bad neighbour."[24] 4.—Shafii's view. 5.—Pre-emption justified.

The nature of the right makes it clear that its existence is no defence to a suit for possession by the purchaser of the interest of another co-sharer.[25]

The question has been raised, but not decided, whether the right of pre-emption creates an interest in the land.[26]

II. OPERATION OF PRE-EMPTION.. (A) LAW OF SUNNIS AND SHIAS.

**523.** (1) The Sunni or Shia law of pre-emption respectively governs persons belonging to the said schools.[1]

(2) Pre-emption may be based on custom[2] or may arise out of the wajibu'l-arz[3] or other contract, or under a legislative enactment;[4] and in such cases, subject to ss. 523 C-D, the terms of the custom or contract or enactment (as the case may be) are strictly[5] enforced.[6] Custom: contract.

21 Sweet, *Law Dict.* cited, *Encyc. Laws of Eng.* s. v. pre-emption.

22 Hed. 548. Shafii therefore does not admit it in favour of neighbours.

23 Bail. II. 176 (par. 3).

24 Hed. 550 (col. i., par. 4); 558 (col. ii., par. 1, 2).

25 *Ajudhia Baksh Singh* v. *Arab Ali Khan*, (1885) 7 All. 892 (decree passed in suit to which minor not party: minor sues execution purchaser & claims possession of his (minor's) share in estate: *held* execution purchaser cannot as defence plead right of pre-emption: pre-emption must be sued for in separate suit).

26 *Sitaram Bhaurau* v. *Sayed Sirajul K.*, (1917) 41 Bom. 636, 650(= p. 679, *n.* 4); cf. Trans. of Prop. Act, s. 54 (last clause), s. 40.

1 Cf. *Qurban Husain* v. *Chote*, (1899) 22 All. 102.

2 As to proof of CUSTOM see s. 10 A, pp. 71 ff.

3 Agreement creating right of pre-emption is not compulsorily REGISTRABLE: *Tribhuvan* v. *Bai Khushal*, (1923) 25 Bom. L. R. 79.

4 *Birendra Bikram S.* v. *Brij Mohan Panday*, (1934) 61 I. A. 235 (OU.). E.g. AGRA PRE-EMPTION (Local) ACT XI. of 1922: *Abdul Khan* v. *Shakira B.*, (1927) 50 All. 348; *Ashraf B.* v. *Muhammad Abdul Raoof*, (1927) 50 All. 404; *Zainab B.* v. *Umar Hayat Khan*, (1936) 58 All. 873; *Shankar Lal* v. *Hashmi B.*, (1932) 54 All. 1023 (s. 4 & Limit. Act, s. 19); *Amjad Ali K.* v. *Saddat B.*, (1931) 53 All. 525. See also PUNJAB PRE-EMPTION & OUDH LAWS ACT, 1913, 1876: s. 557 below, pp. 726 ff.

5 (i) *Chesterman* v. *Mann*, (1851) 9 Ha. 206 (where plaintiff calls for perform-

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Conflict of laws.

(3) A suit for pre-emption the parties to which are not governed by the same law, is subject to s. 524.

History of pre-emption.

From the history of pre-emption in India (alluded to by the Privy Council)[7] it appears that pre-emption in village communities had its origin in the Muhammadan law. It was apparently unknown in India before the time of the Mughal rulers.

Origin from Muslim law.

In some cases customs of pre-emption grew up among village communities. The Calcutta High Court has held that the preliminary forms of Muhammadan law must always be adhered to.[8]

Pre-emption by custom.

**523 A.** The custom of pre-emption is recognized and enforced in several places.[9] It is enforceable in certain

ance of COVENANT IN WHICH THERE IS NO MUTUALITY,—defendant having no means of enforcing that covenant against plaintiff,—Court very cautiously exercises EQUITABLE DISCRETION to enforce specific performance : if terms of covenant, e.g. about payment, not followed strictly by plaintiff, discretion not exercised : even if defendant has asked for payment of improper amount, plaintiff's duty is to come to Court for having proper amount fixed, not to sit still till time for payment elapses); (ii) *Topham* v. *Duke of Portland*, (1869) L. R., 5 Ch. App. 40, 55 (power must be strictly exercised within limits prescribed); *Lord Ranelagh* v. *Melton*, (1864) 2 Dr. & Sm. 218 = 34 L. J. (CH.) 353 (lessee had right of purchase on payment at expiration of 3 months from notice : payment not made on day when 3 months expired : right of purchase forfeited); (iii) *Weston* v. *Collins*, (1865) 34 L. J. (CH.) 353 (do.); (iv) *Brooke* v. *Garrod*, (1857) 2 De G. & J. 62 (time fixed for payment, for pre-empting : not extended by Court : though pre-emptor asked for abstract of title & there was delay in furnishing it); (v) but see *Ward* v. *Wolverhampton Waterworks Co.*, (1871) L. R. 13 Eq. 243 (RIGHT MAY BE OF REPURCHASE, similar to mortgagor's right of redemption, exercisable at any time ; p. 247 arg ; or like power of appointment which NOT NECESSARILY DESTROYED BY previous INEFFECTUAL & ILLOGICAL ATTEMPT to exercise it); (vi) cf. Act x. of 1877, s. 310 ; Act XXI. of 1860, s. 14, for rights of pre-emption in Court sales ; (vii) *Ilahi Jan* v. *Mohammad Ishaq K.*, [1919] 17 All. L. J. 687 (where right based on contract & contract comes to end, pre-emptor may fall back on Muslim law : but decision went against claim for want of proof).

[6] Cases depending on *wajibu'l-arz* very common. Other contracts : *Rajaram* v. *Krishnasami*, (1892) 16 Mad. 301 ; *Haris Paik* v. *Jahuruddi Gazi*, (1897) 2 Cal. W. N. 575. In contracts, pre-emption frequently called *option* to purchase.

[7] *Digambar Singh* v. *Ahmad S. K.*, (1914) 42 I. A. 10 (ALL.).

[8] *Fakir Rawot* v. *Sheikh Imambaksh*, (1863) W. R. (F. B.) 143 = Beng. L. R. SUPP. VOL. 35, generally approved by P. C. in *Jadu* v. *Maharani Janki*, (1912) 39 I. A. 101 = 39 Cal. 915 ; different view of HISTORY OF LAW had been taken in (*Chowdhree*) *Brij Lall* v. (*Raja*) *Goor Sahai*, (1867) N. W. P. (F. B. RUL.) July-Dec. 1867, p. 95.

[9] In this *n.*, " PR." = " custom of pre-emption prevails in place or amongst class of people referred to." " not-PR." = " it does not so prevail." (i) *Gordhandas* v. *Prankor*, (1869) 6 Bom. H. C. R. (A. C.) 263 ; *Motilal* v. *Harilal*, (1920) 22 Bom. L. R. 806, AHMEDABAD Hindus PR. : *Sitaram* v. *Jiaul Hasan*, (1921) 48 I. A. 475 (upholding 41 Bom. 636). (ii) Bene Israelite buyer from Muslim seller in AHMEDABAD not-PR.: *Hamedmiya* v. *Benjamin*, (1928) 53 Bom. 525. (iii) BEHAR not-PR. : *Jadu* v. *Manarani Janki*, (1912) 39 I. A. 101 (CAL.) affirming *Jadu* v. *Janki*, (1908) 35 Cal. 575 ; *Joy Koer* v. *Suroop*, [1864] W. R. 259 ; *Kasi C. ib.* 189 ; *Fakir Rawot* v. *Sheikh Emambaksh*, Beng. L. R. (SUP. VOL.) 35 = W. R. (SP. NO.) 143 (F.B. ; *Ramdular* v. *Jhumack*, (1872) 8 Beng. L. R. 455 = 7 W. R. 265 ; *Sheojuttun* v. *Anwar*, (1870) 13 W. R. 189. Whether NATIVE OF BEHAR OR DOMICILED there. (iv) BENARES : PR. as to houses ; but that custom not extended to sale of *land*, in absence of strict proof : *Ram Chand Khanna* v. *Goswami Ram Puri*, (1923) 45 All. 401. (v) NATIVE OF LOWER BENGAL seeking his fortune in BEHAR not necessarily PR. : *Byjnath* v. *Kopilmon* (1875) 24 W. R. 59 ; nor person who is co-sharer in property in BEHAR but not domiciled there : *Parsashth* v. *Dhanai*, (1905) 32 Cal. 988 ; *Saiyad Fazal Karim* v. *(Mt.) Bibi Fatmatul Kubra*, (1922) 1 Pat. 774. (VI) CHRISTIAN IN BHAGALPORE : *Moheshee Lal* v. *Christian*, (1866) 6 W. R. 250 not-PR. BROACH see GUJARAT. (vii) in BULSAR : PR. under Hanafi law : *Vithaldas Kahandas* v. *Jametram*, (1920) 44 Bom. 887. (VIII) BURMA PR. *Syed Ebrahim* v. *P. M. Syed Khan*, (1925) 4

localities irrespective of the religion of the parties concerned.[10] SECTION 523A.

The law of pre-emption, as recognized in India, is based on Muhammadan law ; and even where it derives its authority from the customs and usages of the people, "it is presumed to be founded on, and co-extensive with, the Muhammadan law on that subject, unless the contrary is shown."[11] Based on Muhammadan law.

The law of pre-emption has been to a great extent, codified in the Punjab Laws Act, IV. of 1872, ss. 9-20, now Punjab Pre-emption Act I. of 1913 (Punjab Act), the Oudh Laws Act, XVIII. of 1876, ss. 6-15 : see s. 557, pp. 726 ff. See also Act XXII. of 1861, s. 14, (pre-emption allowed to a co-sharer of 'puttee-dari' estate sold in execution of a decree);[12] Act X. of 1877, s. 310, XXI. of 1860, s. 14, (rights of pre-emption on contract sales). Codification of the law of pre-emption. Court sales : pre-emption.

The Acts laying down the law in accordance with which decisions have to be given by the Courts, do not expressly refer to the law of pre-emption. See the table of enactments in Chapter II., p. 28/29. Grounds for enforcing it : I. As "religious usage or institution."

Mahmood, J., held[13] that, the law of pre emption, being based on the traditions of the Prophet's sayings and actions, must be deemed a part of "religious usages or institutions,"[14] and as such necessarily enforceable. But

Rang. 13. (ix) HINDUS IN CHITTAGONG not-PR. ; H.C. held custom not proved. See *Inder N. C.* v. (*Mahomed*) *Nazirooddeen*, (1864) 1 W. R. 234, S.C. on review, *vice versa*, (1866) 5 W. R. 237 : 3 decisions of subordinate Courts holding PR. (x) *Kalidas* v. *Partap*, (1916) 18 Bom. L. R. 693, Hindus in GODHRA PR. (xi) *Reva* v. *Dhulabdas*, (1902) 4 Bom. L. R. 811, assumed Hindus of GUJARAT PR. but that decision & *Gordhandas's Case*, 6 Bom. H.C.R. 263, explained & held in *Dahyabhai* v. *Chunilal*, (1913) 38 Bom. 183, as insufficient to show that whole of Gujarat PR. beyond territorial jurisdiction of Sadr Courts of SURAT & BROACH. Ultimate decision in *Dahyabhai's* case proceeded on omission of parties to go through preliminary ceremonies. (xii) Dist. KHANDESH not-PR. : *Mahomed Beg* v. *Narayan*, (1915) 40 Bom. 358. (xiii) MADRAS not-PR. : *Ibrahim* v. *Muni*, (1870) 6 Mad. H.C.R. 26 (see s. 5) ; *Krishna* v. *Kesavan*, (1897) 20 Mad. 305, MADRAS in general not-PR. ; see s. 523. com., s. 5 ; *Kadakamvali* v. *Mokkath*, (1897) 30 Mad. 388. (xiv) *Zamir* v. *Daulat Ram*, (1882) 5 All. 110 : MUZAFFARNAGAR in *Muhalla* Abupura PR. (xv) HINDUS IN PURNEAH not-PR. : *Kantee* v. *Walee*, (1869) 11 W. R. 251 not-PR. (xvi) *Jagjivan Haribhai* v. *Kalidas Mulji*, (1920) 45 Bom. 605. Hindus of SURAT PR. as to houses : as to agricultural lands, doubtful. (xvii) SYLHET : *Jameelah* v. *Pagul*, (1864) 1 W. R. 251, PR. ; see also *Abdul Jaleel* (*Jabel*) v. *Khalat C.*, (1868) 1 Beng. L. R. (A.C.) 105 = 10 W. R. 165 ; *Syed Abdool* v. *Kalle*, (1866) 6 W. R. Mis. 32 ; *Gireeshchandra* v. *Rabeendranath*, (1930) 61 Cal. 694 (custom in SYLHET so long PR. & has received such judicial recognition, as to put it in category of rule of law ; no more necessary to prove prevalence of Pre-em. by evidence). (xvii) TIPPERAH : *Dewan* v. *Azhurooddeen*, (1866) 5 W. R. 270 (issue whether PR. allowed by custom as against Hindu purchaser in TIPPERAH).

[10] In other cases CUSTOM, where alleged, must be proved (s. 10, pp. 65 ff.) ; one or two solitary instances not = proof : see s. 10 A, pp. 71 ff : *Benarsee* v. *Phool*, (1866) 1 Agra 243 ; *Sheraj Ali* v. *Ramjan B.*, (1867) 8 W. R. 204 ; *Hubeebul Hossain* v. *Lolla Daoki*, [1867] Suth. W. R. 74 ; *Muhammad Mahbubali* v. *Raghubar*, (1915) 13 All. L. J., 951. Whether custom exists is QUESTION OF FACT : *Barumal* v. *Tonsukh*, *ib.* 717 ; & evidence of *wajibu'l-arz* may be rebutted : *Digambar* v. *Ahmad*, (1914) 42 I. A. 101 (ALL.).

[11] *Fakir* v. *Shaikh Emambuksh*, (1863) W. R. 143 ; *Gordhan* v. *Prankor*, (1869) 6 Bom. H.C.R. 263 ; *Rewa* v. *Dulbhdas*, (1902) 4 Bom. L. R. 811 ; cf. *Gobind* v. *Inayatullah*, (1885) 7 All. 775.

[12] Cf. *Shib* v. *Thika*, (1875) 7 N. W. 97.

[13] *Gobind* v. *Inayatullah*, (1885) 7 All. 775 ; cf. *Vahazullah* v. *Boyapati*, (1906) 30 Mad. 519, 521 ; *Abdul* v. *Aziz-ul-Huq*, (1911) 39 Cal. 259 ; *Amir* v. *Saman*, (1910) 7 All. L. J. 956 ; *Imam Din* v. *Hasan*, (1905) 41 Punj. Rec. 309 (No. 85).

[14] Table of Acts (see pp. 28, 29) mentioned "religious usages or institutions" amongst matters to be decided in accordance with Muhammadan law.

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Petheram, C. J., and Oldfield, J., dissented, and held that the Courts are not bound to administer the Muhammadan law in claims of pre-emption, but do so on grounds of equity.[15] The Madras High Court has taken a directly contradictory view. Holloway, J., said that the law of pre-emption was "manifestly opposed" to equity and good conscience,—a conclusion based on a comparison of the Muhammadan law with the Roman and German law on the same point. Roman law differs from the two other systems: under it, the right arises out of contract, and gives only a personal action against the vendor. In Germany almost all trace of the law of pre-emption has disappeared. The Muhammadan lawyers felt the necessity of "an antidote to its beneful influences," and "found it in subtle devices for its defeat," and "short periods of prescription for its exercise."[16]

2. Justice, equity and good conscience.

Recent Bombay decisions.

Batchelor, J., concurred with the view that pre-emption is opposed to justice, equity and good conscience; and that the rules of pre-emption place a clog or fetter upon that freedom of sale, for which the Transfer of Property Act and the Indian Contract Act, provide.[17] Shah, J., while agreeing that pre-emption was opposed to justice, equity and good conscience, hesitated to accept the view that pre-emption was opposed to the statutory law of transfer and contract in British India: for two reasons: (i) pre-emption according to Muhammadan law has been enforced in other parts of India and even in parts of the Bombay Presidency; and (ii) Chapter III. of the Transfer of Property Act which relates to sales of immovable property, does not purport to deal with the right of the vendor to sell, but only provides the mode of effecting sales, and contains provisions as to the rights and obligations of the seller and buyer in the absence of a contract to the contrary.[18] Both judges, however, agreed on (iii) the third ground for decision, viz. that it had not been proved that the custom of pre-emption was recognized in the District of Khandesh.[18]

3. Custom.
4. Contract.

Pre-emption may, be adopted by the customs[19] of the people and enforced on that ground or arise out of contract.[20]

(B) PRESUMPTIONS.

(1) Muslims alone governed by it.

**523 B.**[21] In the absence of proof to the contrary it will be

[15] *Gobind Dayal* v. *Inayatullah*, (1885) 7 All. 775, 815.

[16] *Ibrahim Saib* v. *Muni Mir Udin*, (1870) 6 Mad. H. C. R. 26 (per Holloway, J., Innes, J., concurring).

[17] *Mahomed Beg. A.* v. *Narayan Meghaji*, (1915) 40 Bom. 358; cf. *Sitaram* v. *Bhaurau Sayad Sirajul K.*, (1917) 41 Bom. 636, 649, 650 affirmed (1921) 48 I. A. 475 = 45 Bom. 1056.

[18] *Mahomed Beg. A.* v. *Narayan Meghaji*, (1915) 40 Bom. 364, 365, 368.

[19] *Gordhandas* v. *Prankor*, (1869) 6 Bom. H.C.R. 263.

[20] E.g. in *Rajaram* v. *Krishnasami*, (1892) 16 Mad. 301; *Sitaram B.* v. *Sayad Sirajul K.*, (1917) 41 Bom. 636 affirmed *Sitaram* v. *Jiaul Hasan*, (1921) 48 I. A. 475 = 45 Bom. 1056: s. 310 Act XXI. of 1860, s. 14, for rights of pre-emption on court SALES. For Shafii law see *Minhaj*, 205 (Bk. 18, s. 1). *Wajid Ali* v. *Shaban*, (1909) 31 All. 623 (pre-emption under (i) Muhammadan law, (ii) contract, & (iii) custom distinguished).

[21] Sect. 523B cited & applied: *Syed Ebrahim* v. *P. M. Syed Khan*, (1925) 4 Rang. 13.

presumed that Muslims are subject to the law of pre-emption, and that non-Muslims are not subject to it.[22] SECTION 523B.

**523 C.** In the absence of proof to the contrary it will be presumed that where the law of pre-emption is adopted by custom [or contract[23]] it is the Muhammadan law[24] in accordance with the Hanafi[25] exposition thereof.[26] (2) Pre-emption and Hanafi law.

*Presumptions.*

Peacock, C. J. observed that where "a right or custom of pre-emption" "exists, it must be presumed to be founded on, and co-extensive with, the Muhammadan law upon that subject, unless the contrary be shown ; the Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Muhammadan law of pre-emption. But the assertion of the right must always be preceded by an observance of the preliminary forms prescribed in the Muhammadan law, which forms appear to have been invariably observed and insisted on, through the whole of the cases from the earliest times of which we have record.[27] In this requirement we see no evil, inasmuch as a right of pre-emption undoubtedly tends to restrict the free sale and purchase of property, and it is desirable, therefore, to encompass it with certain rules and limits, lest the right should be exercised vexatiously."[28] Mahmood, J., also expressed a strong view to the

1.—Calcutta view : co-extensive with Muhammadan law.

Preliminary forms.

2.—Mahmood, J. : pre-emption originates from Muhammadan law.

[22] *Fakir Rawot* v. *Imam Baksh*, (1863) Beng. L. R. (SUPP. VOL.) 35 = 35 W. R., Sp. No. 143 (F. B.); cf. *Jadu Lal Sahu* v. *Maharani Janki Koer*, (1912) 39 I. A. 101 = 39 Cal. 915 ; *Syed Ebrahim* v. *P. M. Syed Khan*, (1925) 4 Rang. 13 (pre-emption prevails in BURMA under Burma Laws Act, XIII. of 1898, s. 13); *Ajimtulla Saha* v. *Jadavnath Chakrabutty*, (1925) 30 C. W. N. 292 (purchaser Hindu : pre-emp. not applicable); *Furman Khan* v. *Bhurut Chunder*, (1869) 13 W. R. (F. B.) 21 ; *Ramchand Khanna* v. *Goswami Ram Puri*, (1923) 45 All. 501 (not to be extended amongst Hindus beyond limits established by custom).

[23] See *Muhammed Usman* v. *Muhammad Abdul Ghafur*, (1912) 34 All. 1 (when it arises under CONTRACT, the contract can affect general law only during subsistence of the contract : general law revives when the contract is no more applicable ; *Ilahi Jan* v. *Mohammad Ishaq K.*, [1919] 17 All. L. J. 686 (right claimed on contract which came to end on settlement : plaintiff allowed to fall back on Muslim law); *Jagmohan Prasad* v. *Brijendra Bahadur Sing*, (1924) 46 All. 627 ; *Sitaram Bhaurao* v. *Sayed Siraj-ul-Khan*, (1917) 41 Bom. 636, 652, (contract for pre-emption : parties having agreed what law to apply). See n. 26.

[24] *Jadu Lal Sahu* v. *Janki Koer*, (1912) 39 I. A. 104, 107 (CAL.); *Jagmohan Prasad* v. *Brijendranath B. S.*, 46 All. 627 (entry in WAJIBU'L-ARZ under Beng. Regul. VII. of 1822, PRESUMED to record custom or local usage : if not specified, right to be enforced in accordance with MUHAMMADAN LAW).

[25] *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 55.

[26] *Chakauri Devi* v. *Sundari Devi*, (1905) 28 All. 590 (in absence of allegation & proof as to any custom different from or not CO-EXTENSIVE with MUHAMMADAN LAW of pre-emption, that law applicable to Hindus); *Ganeshi Lall* v. *Luchman Dass*, (1873) 5 N. W. 31 ; cf. *Arjun Singh* v. *Sarfaraz Singh*, (1888) 10 All. 182 ; *Ram Prasad* v. *Abdul Karim*, (1887) 9 All. 513 ; *Jog Deb Singh* v. *Mohammad Afzal*, (1905) 32 Cal. 982 ; *Jadu Lal* v. *Janki Koer*, (1912) 14 All. 436, 442, (P. C.). See also *Jai Ram* v. *Muhabir Rai*, (1885) 7 All. 720, 728 (cf. s. 547, com.); *Jasoda Nand* v. *Kandhaiya Lall*, (1891) 13 All. 373 ; *Rustom Ali Khan* v. *Abbasi Begum*, (1891) 13 All. 407 ; *Jag Deo Singh* v. *Kazi Sayed Mohammed Afzal*, (1905) 9 Cal. W. N. 826 ; *Zamir Ahmad* v. *Abdul Razzak*, (1915) 13 All. L. J. 704.

[27] So far quoted with approval : *Jadu Lal* v. *Janki Koer*, (1912) 39 I. A. 101.

[28] *Fakir Rawot* v. *Sheikh Emam Bukhsh*, (1863) W. R. (SP. NO.) 143 = Beng.

SECTION 523C. 3.—Earlier Allahabad view.

same effect, and that there was no foundation for it in Hindu law : [29] " the administration of law by the kazis during the Muhammadan period gave wide currency to haq-i-shufa and its advantage became so apparent to the Hindus, that they attempted to naturalize it ... by an interpolation in he Tanra in question," i.e. in the Maha Nirvana.[30]

(3) Wajibu'l-arz : presumption as to custom.

**523 D.** A pre-emption clause in a wajibu'l-arz will be presumed to record a pre-existing custom, unless its language or other evidence indicates a new contract.[31]

(4) Law of pre-emption personal not territorial.

**523 E.**[32] The law of pre-emption is personal.[33] It is not territorial, nor an incident of property. A person who is not a native of or domiciled within a locality where pre-emption is enforced by law, or custom, but who owns land within the said locality,[34] will not necessarily be subject to the law of pre-emption.

(c) Under Acts.

**523 F.** Pre-emption may be claimed under several Acts of the Legislature.[1]

L. R. (SUPP. VOL.) p. 35. Noted as significant fact that every term employed in connection with, & the name of the right itself, *shufa*, borrowed from Arabic : pleader, himself a Hindu, could not refer to any term of Hindu origin connected with subject : no separate Hindu custom ever pleaded : nor applicability of Muhammadan law ever disputed by defendant until point orally taken up at hearing.

[29] *Gobind Dayal* v. *Inayatullah*, (1885) 7 All. 775 (F. B.); *Deokinandan* v. *Sri Ram*, (1889) 12 All. 234, 269 (F. B.); *Deonadan Prashad S.* v. *Ramdhari C.*, (1916) 44 I. A. 80 = 44 Cal. 675, 686 (P. C.). Cf. *Ram Pershad* v. *Abdul Karim*, (1887) 9 All. 513 (where *wajibu'l-arz* gave right of *shufa* according to usage of country); *Jadu Lal* v. *Janki Koer*, (1912) 39 I. A. 101 = 39 Cal. 915 (where this view seems to be adopted by P. C., *per* Syed Sahib Ameer Ali).

[30] *Chowdhree Brij Lall*, (1867) N. W. P. (F. B. R.) 65 (the view was expressed that it is not to be assumed that pre-emptor must necessarily prove compliance with the conditions essential under Muhammadan law). Cf. s. 556, com., p. 725.

[31] *Bhim Sen* v. *Motiram*, (1910) 33 All. 85 (F. B.), following *Majidan Bibi* v. *Sheigh Hayatan*, (1897) All. W. N. 3 (F. B.). ON CUSTOM : *Hazari Lal* v. *Durga Prasad*, (1909) 22 All. 187. ON CONTRACT : *Kanchan Singh* v. *Mani Ram*, (1910) *ib.* 201 ; *Tasadduq Hussain Khan* v. *Ali Khan*, (1908) All. W. N. 121 = 5 A. L. J. 470 ; *Pran Sukh* v. *Saliq Ram*, (1910) 32 All. 261. Cf. *Ganga Singh* v. *Chedi Lal*, (1911) 33 All. 605.

[32] Sect. 523 E cited & applied : *Syed Ebrahim* v. *P. M. Syed Khan*, (1925) 4 Rang. 13.

[33] See Punjab Pre-emption & Oudh Laws Acts : (s. 557 below, pp. 726 ff.) pre-emption applied to Muslims, mainly on ground of justice & equity. Cf. s. 5, above, p. 38.

[34] *Byjnath Pershad* v. *Kopilmon Singh*, (1875) 24 W. R. 95 (Hindu resident of Calcutta registered as pleader at Arrah in Behar, owns & sells land there : no pre-emption) ; *Parsashth Nath Tewari* v. *Dhanai Ojha*, (1905) 32 Cal. 988 ; *Hamedmiya* v. *Benjamin*, (1928) 53 Bom. 525 ; *Saiyed Fazal Karim* v. (*Mt.*) *Bibi Fatmatul Kubra*, (1922) 1 Pat. 774.

[1] E.g. PUNJAB PRE-EMPT. & OUDH LAWS ACTS ; (s. 557 below, p. 726), AGRA PRE-EMP. ACT (Local) XI. of 1922 ; *Abdul Khan* v. *Shakira B.*, (1927) 50 All. 348 (Agra Pr. Act, s. 16) ; *Ashraf B.* v. *Muhammad Abdul Raoof*, *ib.* 404 (s. 12(3).) : competition between sister & uncle) ; *Amjad Ali K.* v. *Saadat Begam*, (1931) 53 All. 524 (s. 1(3), prov. (3) ; s. 16) ; *Shankar Lal* v. *Hashmi Begam*, (1932) 54 All. 1023 (Limit. Act, s. 19 ; Agra Pre-emp. Act, s. 4(9).) ; *Zainab Bibi* v. *Umar Hayat K.*, (1936) 58 All. 873 (Agra Pr. Act, ss. 3 (prov.), 4(3), 16). Under BERAR LAND REVEN. CODE, 1928 :

SECTION 524.
(D) CONFLICT OF LAWS : DIFFERENT RELIGIONS.

**524.** (1) *Quaere,* whether pre-emption cannot be lawfully claimed if the law by which the pre-emptor is governed, does not, in the particular circumstances allow it.[2]

(2) If the seller is not governed by the law of pre-emption, pre-emption cannot be lawfully claimed.[3]

Personal law of—
1. pre-emptor,
2. seller,
3. purchaser.

(3) The Allahabad[4] and Patna[5] High Courts hold that the personal law of the purchaser does not affect the question whether pre-emption may be claimed ; the Calcutta High Court has held that pre-emption can not be claimed unless the purchaser as well as the pre-emptor and the seller are all governed by the law of pre-emption.[6]

Seller and pre-emptor must both be governed by law of pre-emption.

*Explanation.*—(1) Pre-emption cannot be claimed unless the pre-emptor and the seller are Muslims or are, by custom or contract or by operation of a legislative enactment, subject to pre-emption. (2) *Quaere,* whether where the pre-emptor and the seller are subject to different personal laws of pre-emption, the claim to pre-emption is enforceable only[7] in cases

*Namdeo* v. *Keshao*, (1937) Nag. 469 (legitimate to look for assistance to Muhammadan law where Act silent).

[2] See s. 524, *ill.* (1). The three subsections of s. 524 deal with question how far enforceability of pre-emption is governed by personal law respectively of (1) pre-emptor, (2) seller, (3) purchaser.

[3] "The right of pre-emption arises from rule of law by which the owner of land is bound, & it exists no longer if there ceases to be an owner who is bound, by the law either as Muhammadan or by custom" : *Poornoo Singh* v. *Hurry Churn Surmath*, (1872) 10 Beng. L. R. 117 = 18 W. R. 440, followed in *Byjnath Pershad* v. *Kopilmon Singh*, (1875) 24 W. R. 95 ; *Dwarka Das* v. *Hussain Baksh*, (1878) 1 All. 564 ; see also *Pir Khan* v. *Faiyaz Hussain*, (1914) 36 All. 488 ; CONTRA : *Chundo* v. *Alimoodeen*, (1873) 6 N. W. 28 etc. ; see s. 524, *ill.* (1), com., *Saiyad Fazal Karim* v. (*Mt.*) *Bibi Fatmatul Kubra*, (1922) 1 Pat. 774 (where pre-emption applies by custom among non-Muslims in particular area, it does not become part of personal law of such persons : therefore non-Muslim, subject to pre-emption in one locality, not necessarily subject to custom in another locality, where he owns property).

[4] *Moti Chand* v. *Mahomed Hossein Khan*, (1875) 7 N. W. 147 ; *Chundo* v. (*Hakeem*) *Alimoodeen*, [1874] Agra F. B. 305, 6 N. W. 28, had held : right of pre-empt. (i) not enforceable where *buyer* Hindu & therefore not governed by law of pre-emption, & that (ii) it would be enforced though *seller* was Hindu. This view followed from reasoning that only buyer & pre-emptor concerned in pre-emption : seller "being not in the least degree interested in the matter & need not be considered." *per* Pearson, J. But this is no more law : *Gobind Dayal* v. *Inayatullah*, (1885) 7 All. 775 (F. B.) ; *Dwarka Das* v. *Husain Baksh*, (1878) 1 All. 564 (F. B.) (Stuart, C. J., & Pearson, J., dissenting).

[5] *Achutananda Pasait* v. *Biki Bibi*, (1922) 1 Pat. 578 (pre-emptor Muslim : Hindu buyer : pre-emption allowed).

[6] *Kudratulla* v. *Mahini Mohan*, (1870) 13 W. R. (F. B.) 21 = 4 Beng. L. R. (F. B.) 144. But in *Jog Debi Singh* v. *Mahomed Afzal*, (1905) 32 Cal. 982 (seller SUNNI ; buyer Hindu ; pre-emptor SHIA : but point seems not taken, that the right not enforceable, unless buyer is MUSLIM or otherwise bound by law of pre-emption. Merely argued that (*a*) pre-emptor's law (i.e. SHIA, not SUNNI law) prevailed ; (*b*) preliminary ceremonies not duly performed. *Jog Debi Singh's* case not followed in *Pir Khan* v. *Faiyaz Hussain*, (1914) 36 All. 488.

[7] This seems to follow from *ill.* (1) as far as Allahabad H. C. concerned. Cf. *per* Mahmood, J. *Gobind Dayal* v. *Inayatullah*, (1885) 7 All. 775 : "The rights and

SECTION 524. where it is reciprocally enforceable, i.e. where it would have been enforceable also under the personal law of the pre-emptor, had he been the seller.[7]

*Illustrations.*

(1) *As to the personal law of the pre-emptor* : A Shia cannot enforce pre-emption on the ground of vicinage even though both the vendor and vendee are Hanafis.[8]

(2) *As to the personal law of the seller* : S, a Hindu (who is not subject to the law of pre-emption : see s. 523-B) sells land ; pre-emption under Muslim law is not enforceable.[9]

(3) *As to the personal law of the buyer* : S and P are Muslim neighbours, and S sells his share to B, who is not a Muslim : *held*, (*a*) in Calcutta and (*b*) in Bombay[10] that pre-emption cannot be claimed, (*c*) held in Allahabad that P may enforce pre-emption against B.[11]

(4) The plaintiff, a Hanafi, claimed pre-emption alleging that he was a khalit ; the purchaser, a Shia woman, defended the suit on the ground that she was also a khalit. The plaintiff contended that while under the Shia law (by which the defendant was governed) khalits had no right of pre-emption, under the Hanafi law (by which he himself was governed) Khalits had the right. *Held*, that if a Hanafi claims pre-emption on the ground that he is a khalit, he cannot oust a vendee who is in the same position, whether that vendee is a Shia, Sunni or Hindu. Consequently the suit was dismissed.[12]

**Conflict of laws.**

**1.—Does religion of (i) pre-emptor or (ii) buyer affect rights ?**

Under Shia law pre-emption is not claimable by a non-Muslim where the purchaser is a Muslim.[13] "The shafi is every partner of a share in joint and undivided property, who is able to pay the price at which it has been sold. It is, however, a condition that he be a Muslim, when the purchaser is of that religion."[14] Under Hanafi law the religion of the pre-emptor does not affect his rights.[15] The question,[16] turns on whether (i) the right of pre-emption

**Nature of right : (i) defect of title, or**

obligations created by that (viz. Muhammadan) law, as indeed by every other system with which I am acquainted, must necessarily be reciprocal." But in *Jog Debi* v. *Mahomed*, (1905) 32 Cal. 982, seller was Shia, pre-emptor Sunni : Sunni law applied. See com. *Hamedmiya* v. *Benjamin*, (1928) 53 Bom. 525 (pre-emptor & seller MUSLIM : buyer BENE ISRAELITE : claim to pre-empt not allowed).

[8] *Qurban Husain* v. *Chote*, (1890) 22 All. 102.

[9] *Dwarka Dass* v. *Husain Baksh*, (1878) 1 All. 564 (F. B.), (Stuart, C. J. & Pearson, J., dissenting).

[10] (*Sheikh*) *Kudratulla* v. *Mahini Mohan Shaha*, (1869) 4 Beng. L. R. (F. B.) 134 = 13 W. R. (F. B.) (by Peacock, C. J., Kemp & Mitter, JJ.) (Norman & Macpherson, JJ., dissenting) ; *Hamedmiya* v. *Benjamin*, (1928) 53 Bom. 525, cf. also *Hira* v. *Kallu*, (1885) 7 All. 916.

[11] *Gobind Dayal* v. *Inayatullah*, (1885) 7 All. 775 (F. B.) ; followed *Achutananda Pasait* v. *Biki Bibi*, (1922) 1 Pat. 578.

[12] *Rokaiya Begam* v. *Ahmadi Khanam*, (1912) 9 All. L. J. 769.

[13] Bail. II. 179 (par. 1), 180 (par. 3).

[14] Bail. II. 179 (par. 1).

[15] Bail. I. 473 (479) ; (par. 2) ; Hed. 556 (col. i. par. 2), 557 (col. ii. par. 4).

[16] *Gobind Dayal* v. *Inayatullah*, (1885) 7 All. 775 (F. B.) (VIEW (i) *per* Mahmood, J., adopted by his colleagues Petheram, C. J., Oldfield, Broadhurst, & Duthoit, JJ.) = as put (but rejected) by Mitter, J., "A legal disability on his part to sell his property to a stranger without giving an opportunity to his co-parceners & neighbours to purchase in the first instance" : (*Sheikh*) *Kudratulla* v. *Mahini Mohan*, (1869)

depends upon a defect of title on the part of Muhammadan co-parcener to sell, except subject to the right of pre-emption,[17] or whether (ii) it is mere right of repurchase, not from the vendor, but from the vendee. As to this last suggestion, Mahmood, J., says that it can only be a "right of substitution entitling the pre-emptor by reason of a legal incident to which the sale itself was subject ... the right being necessarily antecedent to the injury. My conceptions of jurisprudence prevent me from conceiving any kind of right of which both the *inception* and the *infringement* depend upon one and the same incident." The right of pre-emption cannot in his opinion be defeated in India by the devices (characterized by Mitter, J., as "tricks and artifices") to which the Muslim texts refer. "There is nothing whatever," opined Mitter, J.,[18] "in the Muhammadan law which imposes upon anyone the obligation of making the first offer to his neighbour." But Mahmood, J.,[19] cites texts[17] that "it is not lawful for anyone to sell till he has informed his co-parcener who may take or leave it as he wishes; and if he has sold without such information, the co-parcener has a preferential right to the share."[17] Cf. p. 727(5).

SECTION 524. (ii) right of repurchase.

Obligation to make first offer to neighbours.

Where a Hanafi claimant to pre-emption sues a Shia seller and a Hindu purchaser, the governing system of law has been held to be the Hanafi, as that system is in force in India territorially or by custom, and the Shia law to be applicable only where the claimant and vendor are both Shias[18]—*sed quaere*, whether any such broad rule can be laid down.[19]

2.—Shia vendor: Hindu purchaser: Hanafi pre-emptor.

**524 A.** In construing a contract containing the terms of pre-emption, the Court will give effect to the intention of the parties as expressed therein without alteration or addition.[20]

III. INTERPRETATION: WAJIBU'L-ARZ.

"You are to look at the intention of the parties in determining what system of law was to be taken as applying and what was to be taken to be the date of the sales with reference to which the ceremonies were performed."[21]

Construction of contract.

The terms of a contract for pre-emption are strictly construed by the Courts, both in England and in India, (s. 423(2).) as pre-emption is not favoured by the law: s. 556. See s. 545, p. 714, *n.* 13.

**524 B.** Certain words and expressions have been judicially interpreted with reference to the particular contract, context and circumstances[22]—

Words interpreted by Courts.

4 Beng. L. R. (F. B.) 134, 139, 140 = 13 W. R. (F. B.) 21; Peacock, C. J., Kemp & Mitter, JJ. (Norman & Macpherson, JJ., *diss.*) take VIEW (ii), viz. that it is repurchase: VIEW (ii) also adopted in *Hamedmiva* v. *Benjamin*, (1928) 53 Bom. 525, 533.

[17] *Ain Sharh-Kanz*, II. 237; *Muslim*, VI. 32, *Nawawi Sharh Muslim*, II. 52.

[18] *Jug Deo Singh* v. *Kazi Sayed Mahomed Afzal*, (1905) 9 Cal. W. N. 826.

[19] See ss. 6A, 8. Cf. *Akbarally* v. *Mahomedally*, (1932) 57 Bom. 551.

[20] *Chowdhry Brij Lall* v. *Goor Sahai*, (1867) Agra F. B. 128. For *ill.* see *Ruttun Singh* v. *Umrao Singh*, (1872) 4 N. W. 13; *Dowlut* v. *Netram*, (1871) 3 N. W. 42.

[21] *Sitaram* v. *Jiaul Hasan*, (1921) 48 I. A. 475, 481 (BOM.). See *Spurrier* v. *La Cloche*, [1902] A. C. 446 (parties residing in different countries where DIFFERENT SYSTEMS OF LAW prevail: their INTENTION true criterion to determine by what law interpretation & effect of contract to be governed). *Hamlyn* v. *Talisker*, [1894] A. C. 202.

[22] They would not (*submitted*) necessarily be interpreted always in same sense:

SECTION 524B.

'Bhai band.' (1) 'bhai band' as the brotherhood of the village, and not merely relations by blood ;[23]

'Ek-jaddi.' (2) 'ek-jaddi' as descendants from a common ancestor, through the male line ;[24]

'Haq qiyat.' (3) 'haqqiyat' as rights and interests in the legal sense of the phrase ;[25]

'Hissadar.' (4) 'hissadar' (after the village had been perfectly partitioned into three mahals, without a new wajibu'l-arz), as the owner of a share in the same mahal as the seller ;[26]

'Hissadaran shikmi.' (5) 'hissadaran shikmi' (in clauses dealing with classes of persons entitled to pre-empt in preference to strangers) as not necessarily implying any idea of subordination but as signifying co-sharers in the particular 'khattu' of the 'patti' in which the land sold was situated ;[27]

'Intiqal.' (6) 'intiqal' as signifying not only an absolute transfer, but having the broadest meaning in connection with alienation, conveyance, assignment, or transfer of rights in immovable property,[28] and applying also to conditional sales and usufructuary mortgages ;[29]

'Karibi.' (7) 'karibi' (qaribi) as ambiguous, and inadequate to express the relations between share-holders 'near' to the seller :

(*a*) 'karibi,' read in connection with 'bhai' which word preceded it in the wajibu'l-arz under construction, as not confined to cousins, but as meaning 'bhai band' or 'bhailog' so as to include all near relatives both male and female ;[30]

'Bhai band.'

'Karibi wakhandani.' (*b*) 'karibi wa khandani' as not including a person related to the seller through the female line only, and twelve degrees removed from him ;[31]

decisions do not condemn these unoffending words to "prisons ordained in utter darkness : far removed from the light of heaven" (*Par. L.* I. 70)– & of the context.

[23] *Hira Lal* v. *Ramjas*, (1883) 6 All. 57.

[24] *Chatai Singh* v. *Kalyan Singh*, (1900) 23 All. 32. Cf. *Ashraf B.* v. *Muhammad Abdul Raoof*, (1927) 50 All. 404 (under AGRA PRE-EMP. ACT (Local) XI. of 1922, s. 12(3), on COMMON ANCESTOR); *Padam Singh* v. *Umrao S.*, [1923] 21 All. L. J. 527 (*bhai haqiqi ekjaddi*).

[25] *Sheoratan Kuar* v. *Mahipal K.*, (1884) 7 All. 258.

[26] *Dalganjan S.* v. *Kalka S.*, (1899) 22 All. 1 ; cf. *Sheobalak S.* v. *Lachmidar*, (1901) 23 All. 427.

[27] *Abdul Shakur* v. *Mendai*, (1901) 23 All. 260.

[28] *Sheoratan Kuar* v. *Mahipal Kuar*, (1884) 7 All. 258 ; *Jagdam Sahai* v. *Mahabir Prasad*, (1905) 28 All. 60.

[29] *Chuttur Mull* v. *Chuttur Kishore Lall*, (1868) 8 Agra 396.

[30] *Khuman S.* v. *Hardai*, (1888) 11 All. 41.

[31] *Durga Prasad P.* v. *Fateh B. S.*, (1914) 36 All. 451.

(8) 'pattidar' as not including a 'chakdar' holding a share in the same 'chak' as the seller ;" [32] SECTION 524B. 'pattidar.' 'Chakdar.'

(9) 'qimat' in the sense given it by Muhammadan law, as including (*a*) not only money but (*b*) other kinds of property capable of being valued at a definite sum of money, and (*c*) covering the consideration of sale as well as exchange as defined in the Transfer of Property Act, ss. 54, 118 ; [33] and (*d*) also wide enough to include the consideration given for a usufructuary mortgage with possession ; [34] 'Qimat.'

(10) 'rahn' as a generic word indicating all that is included in the English word mortgage, not limited to usufructuary mortgages : including simple mortgages ; [35] 'Rahn.'

(11) "sale, etc." as including a usufructuary lease for a term of eight years ; [36] "Sale, etc."

(12) 'shikmi showkayan' in the particular context as implying priority in favour of sharers in the thoke over those who were merely sharers in the village.[37] 'Shikmi showkayan.'

**524 C.** The question frequently arises whether, under the particular wajibu'l-arz, the right of pre-emption has been confined to cases where the sale is to a stranger, or is extended to cases where, had the sale been to a stranger, the purchaser would himself have been entitled to pre-empt.[38] Sale to one who might himself have pre-empted.

## § 2.—PRE-EMPTION : HOW IT ARISES : HOW ENFORCED.

**525.**[1] The right of pre-emption arises under Muhammadan law only on an exchange of property for property ;[2] I. SALE OR GROUND OF PRE-EMPTION. Only transfer for consideration.

[32] *Balwant S.* v. *Subhan A.*, (1887) 10 All. 107.

[33] *Niamat Ali* v. *Asmat B.*, (1885) 7 All. 626.

[34] *Hulas Rai* v. *Ram Prasad*, (1906) 28 All. 454.

[35] *Sheoratan Kuar* v. *Mahipal K.*, (1884) 7 All. 258. Cf. extract from *Sharaiu'l-Islam* in s. 370, com.

[36] *Ahmed Ali K.* v. *Ahmed Ali*, (1866) 1 Agra 101.

[37] *Jey Mull* v. *Kesree*, Agra F.B. 171, ed. 1874, 128.

[38] *Janki* v. *Ram Partab S.*, (1905) 28 All. 286 ; *Sardar S.* v. *Ijaz Husain K.*, (1906) 28 All. 614 ; *Jai Dat* v. *Ram Badal*, (1905) 28 All. 168 ; *Sukhdeo S.* v. *Bahadur S.*, (1904) 26 All. 544 ; *Khatun B.* v. *Sayida B.*, (1905) 27 All. 457 ; *Amjad Ali* v. *Mushtaq Ahmad*, (1895) 17 All. 454, upheld (1897) 19 All. 311 ; *Mathura Prasad* v. *Hardeo Bakhsh S.*, [1920] 18 All. L. J. 518. For general law see s. 527.

[1] Sects. 525 & 526 are complementary.

[2] I.e. either sale or barter, s. 552(1), p. 662, *n.* 6. Cf. *Sewa* v. *Risal*, (1866) 1 Agra 144 ; *Niamat* v. *Asmat*, (1885) 7 All. 626 (plot exchanged) ; *Lachmi* v. *Manog*, [1889] 5 All. W. N. 47 (suit compromised). PROPERTY CONFISCATED BY GOVT., then sold : (i) (1869) *Sheodut* v. *Ramadpree*, 1 N. W., Part II., p. 35 (ed. 1873), p. 93 ; (ii) *Mahomed Villaytolla* v. *Ahmed*, (1868) 3 Agra 70 ; (iii) *Coltr. of Futtehpore*

SECTION 525. not on a transfer (*a*) without consideration [3] (*b*) by operation of law ; [4] but (*c*) it is not necessary that the land sold should be actually separated or defined.[5]

*Illustrations.* (1) With reference to a claim for pre-emption, (*a*) a HIBA BA SHART UL IWAZ is a transfer for consideration,[6] and pre-emption is claimable provided that it is completed by possession being transferred of the subjects of the gift, and of the return, to the donee and the donor, respectively.[6] But (*b*) on a HIBA BIL IWAZ, pre-emption is not claimable, (*c*) nor on a PARTITION of property amongst partners ; [7] (*d*) nor generally on a transfer of property in lieu of MAHR ;[8] *except* that (i) under Shafii law, pre-emption may be claimed by the other co-owners, where a share in land is transferred to the wife by way of mahr, or in consideration for a khul ; [9] (ii) under Hanafi law where a marriage is contracted without any mahr being agreed upon, and land is then sold to a third person or to the wife herself [10] in exchange for her mahru'l-mithl or "proper dower ;" [6] (iii) also where mahr has already become due to the wife, and the land does not form the subject of the mahr, but is transferred to the wife in consideration of her releasing her right to the mahr agreed upon ; [10] (*e*) the courts have taken different views as to whether a SALE IN EXECUTION of a decree is such a transfer as can give rise to rights of pre-emption.[11]

(2) B makes a claim against S, who compounds it by transferring to him

v. *Yad Ali*, (1866) 1 Agra 88. SALES & RE-SALES : (i) *Mahomed Raza K.* v. *Jawahir Singh*, (1867) 2 Agra 1 ; (ii) *Liakat* v. *Rashiduddin*, (1906) 29 All. 125.

[3] SALE DISGUISED as GIFT : pre-emption allowed : *Angan Lall* v. *Muhammad Husain*, (1891) 13 All. 409 ; *Chiragh Din* v. *Allah D.*, (1916) 51 Punj. Rec. 208, (No. 70); cf. *Fida Ali* v. *Muzaffer Ali*, (1882) 5 All. 65. See pp. 725 ff., s. 556, *nn.* *Bashir Ahmad* v. (*Mt.*) *Zubaida K.*, (1923) 1 Luck. 83 (transfer in lieu of *mahr*, held HABA BIL IWAZ : pre-emption disallowed. With all respect, result correct, but reasoning questionable); *Chaudhri Talib Ali* v. (*Mt.*) *Kaniz Fatma*, (1927) 2 Luck. 575 (docmt. called gift for consideration : pre-emption disallowed). Transfer from husband to wife may be considered peculiar & though consideration is MAHR, it may be taken to be free from pre-emption on fundamental ground that TRANSFER TO WIFE CANNOT be considered as TRANSFER INTRODUCING STRANGER. [Cf. *Lalla Nowbat L.* v. *Lalle Jewan L.*, (1878) 4 Cal. 831 (F. B.), now overruled by *Enatulla* v. *Kowsher Ali*, (1926) 54 Cal. 266].

[4] Bail. I. 472 (476); e.g. slave emancipated in EXCHANGE for mansion : no pre-emption : Bail. I. 471 (475); gift, charity, inheritance & bequest are given as *ill.* of transfer without consideration : Bail. II. 177 (par. 4). See also s. 525, *ill.* (1); *Ameer Ali* v. *Pearun*, [1864] W. R. 239 ; *Har Narain Pande* v. *Ram Prasad Misr*, (1891) 14 All. 333 ; *Nuzmoodeen* v. *Kanye Jha*, (1863) 1 Marsh. 555 = 2 Hay 651.

[5] *Gobind Chunder Goopta* v. *Raj Kishore Sein*, (1870) 14 W. R. 365.

[6] Bail. I. 472 (476). *Abdul Rahman* v. *Parsotam*, (1930) 57 I. A. 251, 256 (OU.) (a deed of *hiba bil iwaz* may either fall or not fall within pre-emption provisions of Oudh Laws Act, XVIII. of 1876, Ch. II.); *hiba bil iwaz* properly so called arises on two reciprocal gifts being made : two transfers : can there be a single deed of *hiba bil iwaz* ? But the deed referred to itself as *hiba bil iwaz*. See however cases noted.

[7] Hed. 560 (col. ii. par. 5); Bail. I. 475 (par. 2).

[8] Hed. 559 (col. i. par. 1, 2, 3, *ll.* 19 ff.); Bail. I. 475 (par. 1) (488) : cf. Bail. I. 483 (*ll.* 7-11) (488 *ll.* 8-12), 177 (par. 3).

[9] *Minhaj*, 207 (Bk. 18, s. 2) cited com. ; Hed. 559 (col. i. par. 1).

[10] *Fida* v. *Muzaffar*, (1882) 5 All. 65 ; but see com.

[11] In NEGATIVE : *Nuzmoodeen* v. *Kanye J.*, (1863) Marsh 555 = 2 Hay 651 ; *Abdul Jabel* v. *Khelatchandra*, (1868) 1 Beng. L. R. 105 = *Abdool Juleel* v. *Khellat* C. 10 W. R. 165 (neighbour or partner has every opportunity to bid at auction). In

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a mansion ; this is a transfer for consideration notwithstanding that S denied B's claim.[12] Pre-emption may consequently be claimed.

(3) S claims to own a house ; B compounds S's claim by paying to him Rs. 1,000 ; pre-emption is claimable if claim admitted by B, but not if denied.[13]

(4) S on his death-bed purports to sell his share (valued at Rs. 1,000) in the land to one of his heirs, by mahabat (s. 441A) viz. for Rs. 500. This sale will, in so far as it is valid, be a ground for pre-emption.[14]

(5) Pre-emption was claimed under custom. The custom proved had reference to voluntary transfers (intiqal) by co-sharers ; *held* that the cause of action arose as soon as a mortgage by way of conditional sale was effected ; not from the date when possession was taken in pursuance of a decree absolute.[15]

(6) An oral agreement to sell followed by payment of price and delivery of possession, gives rise to a right of pre-emption.[16]

Transfer by way of mahr and in lieu of mahr.

Where property is assigned as mahr to the wife, the question, under Hanafi law, whether pre-emption is claimable is in the Fatawa Alamgiri and Hidaya made to depend upon whether (i) the subject of transfer is itself the mahr, or (ii) the transfer is made in exchange or in consideration for mahr.

Mahr arises in law as an incident of marriage ;[17] giving the wife a right, the extinction of which may form the consideration for a transfer of property. This explains why if the husband "gives the house as dower, there is no pre-emption ; but if he gives it in exchange for dower, there is pre-emption."[18] The anomalous character of the right to mahr has been referred to.[19] The Prophet seems to have been extremely anxious that the mahr should not in any circumstances be permitted to lend weight to the suggestion that the wife was purchased by the husband, or sold by her guardian or parent, or that when the bride is competent to consent, her marriage can take place except by her consent. He strove hard on the one hand to prevent any pecuniary element being brought as an inducement for the consent, and he wished, on the other

AFFIRMATIVE : *Imam Sewdagur* v. *Abdul S.*, (1866) 5 W. R. 169 ; *Ajoodhia* v. *Jewboodh*, (1873) 6 N. W. 46.

[12] Hed. 559 (col. ii. par. 2, col. i. par. 4) ; Bail. I. 472 (*Il.* 5-12) (576). DISTINCTION between *ills.* (2) & (3) is that in *ill.* (2) person who becomes owner, accepts it in consideration of his claim : in *ill.* (3) if claim denied by B, he remains owner of house which he claimed before, & there is no *transfer* to him for consideration : Hed. 559.

[13] See *n.* 12, COMPROMISES held not to amount to such transfer as to give rise to pre-emption : *Lachmi Narain* v. *Manog Dat*, (1885) 7 All. 291 ; *Hanuman* v. *Udit Narain R.*, (1885) 7 All. 917.

[14] Bail. II. 192 ; to validate it consent of other heirs necessary,—(*a*) under Hanafi law, as to whole ; (*b*) under prevailing view of Shia law, in so far as it exceeds bequeathable 1/3 ; (*c*) whereas another Shia view is, that it is valid without such consent, as to whole, not ranking as bequest at all.

[15] *Suba Singh* v. *Mahabir S.*, (1917) 39 All. 5.

[16] *Abdulla* v. *Ismail*, (1921) 46 Bom. 302 ; *Sitaram* v. *Jiaul H.*, (1922) 48 I. A. 475 (A, holding 1/4 share, agreed to sell it, received portion of price, & stipulated to receive balance, & pass pucca deed later. Pre-emption allowed).

[17] See s. 92, com., p. 171.

[18] Bail. I. 475 (*Il.* 2-4) (479).

[19] See ss. 92, 108, 167 (lien for *mahr*) = pp. 170, 185 ff., 234 ; & ss. 372, 442 (gifts) = pp. 398, 477 ff.

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hand, to convert the wonted "price" for the sale of the woman, into "a token of respect." [20] So understood the rule, it is submitted, though technical in operation, is grounded on principle.

Fida Ali *v.* Muzaffar Ali. 5 All. 65.

Syed Ameer Ali says [21] that "the decision in Fida Ali *v.* Muzaffar Ali [22] does not seem to be correct," because "if a property is conveyed to a wife in discharge of the dower debt, in this case also there is no right of pre-emption....The reason of these rules is self-evident. The wife conveying to the husband and vice versa do not thereby introduce a stranger among co-sharers or neighbours." [23] The reason given applies, no doubt, where the husband and wife are living together on the subject of pre-emption, but this view does not seem to be taken in any of the texts, and no authority is cited by the learned author. Fida Ali's case has been followed.[23]

Shafii law.

In the Minhaj (Shafii text): "A portion of an immoveable property transferred as dower is subject to the right of pre-emption on the part of a co-proprietor, for a price valued according to the proportional dower the woman in question could claim; and the same rule is observed with regard to a transfer as compensatory price in case of divorce." [24]

(A) Right arises only when land completely transferred:

—complete according to which law?

**526.** Pre-emption is not claimable unless the land is completely transferred [1] by the seller to the buyer, so that the seller's interest in it ceases.[2] In each case the intention of the parties must be looked to for determining which system of law is to be taken as applying [3] and what date is to be taken as the

[20] Bail. I. 91.

[21] *Mah. Law*, I. 597, *n.* 1, (713, *n.* 6)

[22] *Fida Ali* v. *Muzaffar Ali*, (1882) 5 All. 65.

[23] *Nathu* v. *Shadi*, (1915) 13 All. L. J. 714. See also (*Syed*) *Mahomed Tukee* v. (*Sheikh*) *Hujjee* alias *Khujjai*, (1873) 5 N. W. 142, which however proceeded on construction of *wajibu'l-arz*.

[24] *Minhaj*, 207 (Bk. 18, s. 2).

[1] Hed. 559 (col. ii. par. 4), 560 (col. i. par. 1); Bail. I. 472 (476), 482 (*ll.* 5-11) (488)); II. 182. *Muhammad Niaz K.* v. *Md. Idris Khan*, (1918) 40 All. 322 (Court must consider & decide if transaction is IN SUBSTANCE SALE—however disguised, e.g. as lease); *Zamani B.* v. *Khan Md. Khan*, (1923) 46 All. 142 (out & out sale, without OPTION necessary); *Muhammad Yunis Khan* v. *Muhammad Saleh Khan*, (1930) 53 All. 169 (if there is option pre-emption claimable when option expires); *Kheyali Prasad* v. *Mullick Nazarul Alum*, (1916) 1 Pat. L. J. 174 (REGISTRATION necessary for completion); *Abdur Razzak* v. *Mumtaz Husain*, (1903) 25 All. 334 (COMPROMISE DECREE in suit for pre-emption no ground for pre-emption). See ss. 526A, 526B. *Sheo Lall Sahoo* v. *S. Rumzanee*, (1867) 2 Agra 35 (shares in *mauza* by arrangement between parties, made over to manager upon trust in part for debt of transferors, residue for transferors: no pre-emption); *Subhagi* v. *Muhammad Ishak*, (1884) 6 All. 463 (on mere proclamation inviting offers: no pre-emption). See also *Budhai Sardar* v. *Sonaullah*, (1914) 41 Cal. 943; *Sheikh Mohammad Jamil* v. *Khub Lal Raut*, (1920) 5 Pat. L. J. 740 (pre-emption claimable only on transfer of proprietary interest of MUKARRARI, i.e. leasehold); (*Mt.*) *Bibi Saleha* v. *Haji Amiruddin*, (1928) 8 Pat. 251 (Sir Sultan Ahmed, advocate, struggled against decision of Sultan Ahmed, J. in 5 Pat. L. J. 740).

[2] *Abdulla* v. *Ismail*, (1921) 46 Bom. 302 (NO REGISTERED DOCUMENT—pre-emption may arise); *Ladun* v. *Bkyro Ram*, (1867) 8 W. R. 255; *Soondur Kooer* v. *Lalla Rughoobur D.*, (1868) 10 W. R. 246; *Buksha Ali* v. *Tofer Ali*, (1872) 20 W. R. 216; *Mohno B.* v. *Juggurnathi Chowdhry*, (1865) 2 W. R. 78. See also ss. 526A, 526B.

[3] *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202, cited *Sitaram* v.

date of the sale with reference to which the preliminary ceremonies must be performed.[4] SECTION 526.

(1) S sells his joint interest in a village for Rs. 300, paid to him by B, who obtains possession, but no transfer under the Transfer of Property Act is executed or registered. *Held* (Mahmood J. dissenting), that the right of pre-emption arose.[5] *Illustrations.*

(2) S sells a dwelling house as a house to be inhabited as it stands, with the same right of occupation as B, but without the ownership of the site.

*Sayad Siraj*, (1917) 41 Bom. 636, 651. *Spurrier* v. *La Cloche*, [1902] A. C. 446 (= p. 679, *n.* 4).

[4] *Sitaram* v. *Jiaul Hasan*, (1921) 48 I. A. 475 (BOM.) (by passing Transf. of Prop. Act, IV. of 1882 no intention to alter directly or indirectly Muhammadan law). In *Najmunnissa* v. *Ajaib Ali K.*, (1900) 22 All. 343, (MUHAMMADAN LAW OF SALE carefully examined); *Fida Ali* v. *Muzaffar A.*, (1882) 5 All. 65. Cf. *Amjad Ali* v. *Mushtaq Ahmad*, (1895) 17 All. 454 ; see also 17 All. W. N. 121. In *Janki* v. *Girijadat*, (1885) 7 All. 382 (F. B.) (sale must be complete in accordance with Muhammadan law, not with law of India); *Begam* v. *Muhammad Yakub*, (1894) 16 All. 344 (F. B.) (Banerji, J. dissenting on this point, but concurring in decree on other grounds): explained by P. C. in 48 I. A. 481. *Abdulla* v. *Ismail*, (1921) 46 Bom. 302 (pre-emption claimable even if no REGISTERED sale deed). *Najmunnissa* v. *Ajaib A. K.*, (1900) 22 All. 343 (non-execution of sale deed, & want of registration, do not prevent pre-emption from becoming claimable but non-ascertainment of price & non-transference of possession under sale, do prevent it). *Budhai Safdar* v. *Sonaullah Mirdha*, (1914) 41 Cal. 943 (dissents from this view : held that pre-emption not claimable until sale complete in accordance with general law of India : i.e. after registration). *Sitaram Bhaurau* v. *Sayad Sirajul Khan*, (1917) 41 Bom. 636, 641 (approved in 48 I. A. 475) also dissented from view of Allahabad H. C. & held that IN EACH CASE INTENTION OF PARTIES MUST BE ASCERTAINED AS TO DATE when bargain to be considered as concluded. This view seems first enunciated by Brett, J., in *Jadu Lal* v. *Janki Koer*, (1908) 35 Cal. 575, 599 ; affirmed 39 I. A. 101 = 39 Cal. 915 ; again affirmed in 48 I. A. 475 ; *Nareshchandra Datta* v. *Gireeshchandra Das*, (1935) 62 Cal. 979. *Mohammad Bashir K.* v. *Kulsum B.*, [1927] 25 All. L. J. 742 (for purposes of AGRA PRE-EMPT. ACT, XI. 1922, (Local), s. 2, transfer in eye of law made on day when deed executed, not on day of registration : Ind. Registr. Act, s. 47). Cf. *Spurrier* v. *La Cloche*, [1902] A. C. 446 (if contracting parties reside in different countries their intention is TRUE CRITERION to determine BY WHAT LAW INTERPRETATION & effect of contract to be governed); *Hamlyn* v. *Talisker*, [1894] A. C. 202. See also *Chatenay* v. *Brazilian Submarine Telegr. Co.*, [1891] 1 Q. B. 79.

[5] *Janki* v. *Girjadat*, (1885) 7 All. 482 (F. B.). (i) Petheram C. J. : claim being based on *wajibu'l-arz* which refers to transfer of share " wholly or in part, by sale or mortgage, &...obviously means that if any co-sharer transfers his rights wholly or partly, right of pre-emption is to arise " ; (ii) Straight, J. : if parties intend sale but deliberately omit to observe necessary legal formality of registered instrument to defeat pre-emption : court of equity would hesitate before permitting defence based on defendant's own intentional evasion of law ; seller could not succeed in suit for possession of share against buyer on ground that there was no registered document, because consideration having been paid & possession obtained, buyer would have good defence. (iii) Oldfield, J. : if transaction amounts to sale in fact, failure of parties to comply with requirements of Act does not alter its nature. (iv) Broadhurst, J. : share transferred, though, with object of defeating pre-emption (under *wajibu'l-arz*), deed of sale not executed. *Held* by Mahmood, J., dissenting : pre-emption right did not arise : because (i) it cannot under Muhammadan law be claimed upon sale which is invalid, & which can take no effect, & when owner not divested of, nor purchaser invested with, proprietory title ; (ii) answer to that question is turning point in decision of such cases ; (iii) words of *wajibu'l-arz* did not refer to transfers of all kinds, but only to sales & mortgages ; they did not include transfer of portions only of incidents [or rights] constituting ownership [cf. p. 345, *n.* 12] ; (iv) nothing that could be called sale had taken place ; (v) if transaction taken as mere agreement to sell, assuming that it could be specifically enforced, suit premature ! following 7 All. 482. *Abdulla* v. *Ismail*, (1921) 46 Bom. 302 (Shah, J., emphasizes intention of parties).

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*Held*, the right of pre-emption attaches to the sale.[6]

(3) S enters into a contract for sale; *held*, that P is not bound to defer enforcing pre-emption till the bill of sale is delivered or registered and payment made.[7]—*Sed quaere.*[8]

(4) As soon as a contract for sale is ratified by acceptance, and the vendor has gone so far that he cannot legally draw back, it is time for the pre-emptor to step in.[9]

(5) S, a Muslim owned 1/4 share in village of Vahal and Pataudi (Bom. Pres.). P, (S's uncle) owned the other 3/4 share. On 14 Oct. 1908, S agreed to sell his 1/4 to a Hindu, B, for Rs. 29,999, provided that if P was willing to purchase S's 1/4, and if S and P agreed to the purchase, then S should immediately return the earnest money to B. On the same date S gave notice of the sale to P stating that if P (as the owner of the 3/4 share) was desirous of purchasing the said villages, he should send S a cheque for Rs. 29,999 by return of post: that in the event of P not replying to this or paying the money within 2 days, S would close the bargain and obtain the sale proceeds. *Held*, (i) that the agreement of sale showed that the parties knew that "under whatever was the law, P, might have a right of pre-emption under Muhammadan law, or under some other law, and the whole transaction was made subject to the exercise by P of that right;" (ii) that the effect of the notice of sale (which B contemplated should be sent) was a recognition that P had a right of purchase as pre-emptor under the law which was treated as applying, "an intimation, an admission that there is a law of pre-emption which is doubtless, from the way in which it is referred to, a general law, and that P holds under that law;" (iii) therefore it was to the general law, not the mere terms of the letter to which reference had to be made, to see what these rights were; (iv) on the question when the sale had taken place (with regard to which date the requisite ceremonies and formations had to be performed) looking at what the parties had represented to each other, the Bombay High Court was right in following Jadu Lal's case;[10] (v) "that the parties represented that a full sale had taken place on 14 Oct., 1908, sufficient to justify P in proceeding[11] at once to the ceremonies and treating that as the crucial time."

As to a sale on credit, see s. 554. On the main point in s. 526, the original arguments are analysed in *ill.* (1), *n.*; Petheram, C. J., however seems to have proceeded on the construction of the wajibu'l-arz which brings his decision very near to the principle now settled by the Privy Council that the intention of the parties must be looked to. The war will now be waged over the intention.

[6] *Zahur* v. *Nur Ali*, (1865) 2 All. 99.

[7] *Luchmee Narain* v. *Bheemul Doss*, (1867) 8 W. R. 500; cf. *Girdharee Lall* v. *Deanutali*, (1874) 21 W. R. 311.

[8] See *Najmunnissa* v. *Ajaib*, (1900) 22 All. 343.

[9] *Nubee Bukhsh* alias *Golam Nubee* v. *Kaloo Lushker*, (1874) 22 W. R. 4.

[10] *Jadulal J. Sahu* v. *Janki Kuar*, (1908) 36 Cal. 575 affd. (1912) 39 I. A. 101.

[11] *Sitaram Bhaurao* v. *Jiaul Hasan*, (1911) 48 I. A. 475 (BOM.).

SECTION 526. Benami transactions.

Several cases dealing with benami transactions have come before the Courts, but they do not seem to enunciate any new principle beyond that the Court endeavours to get to the real transaction under whatever name the parties may have purported to act.[12]

(B) Seller's option postpones it—not buyer's.

**526 A.** (1) Where there is an option to the seller to dissolve the sale, pre-emption is not claimable until after the expiration of the option.[13]

(2) Pre-emption is claimable notwithstanding that there is an option to the buyer to dissolve the sale.[14]

(C) Mortgage gives rise to pre-emption when foreclosed.

**526 B.** Neither is (*a*) a mortgage, until finally foreclosed, such a transfer as can, under the general law, (apart from a contract or custom contained in a wajibu'l-arz or otherwise)[15] give rise to a right of pre-emption, nor is a (*b*) a lease,[16] notwithstanding that the lease is mourusi[17] or is in perpetuity (like a muqarrari), and however small the rent reserved might be.[18]

II. Pre-emption when buyer himself is pre-emptor equal in degree :

**527.**[19] Persons[20] whose claims to pre-emption are equal

[12] *Gunga Ram* v. *Moola*, (1870) 2 N. W. 200 ; *Beni Shankar Shelhat* v. *Mahpal Bahadur S.*, (1888) 9 All. 480.

[13] *Muhammad Yunis K.* v. *Muhammad Saleh K.*, (1930) 53 All. 169 (CONDITIONAL EXCHANGE, with reservation to either party during his life to cancel exchange : no pre-emption) ; *Zamani B.* v. *Khan Md. Khan*, (1923) 46 All. 125 ; *Gurdiyal Mundar* v. *Teknarayan S.*, (1855) Beng. L. R. (SUPP. VOL.) 166 = 2 W. R. 215 (mortgage in form of CONDITIONAL SALE) ; *Bhagwan Das* v. *Mohan Lal*, (1903) 25 All. 421 (on transfer of MORTGAGE by co-sharer mortgagee, to stranger, no pre-emption nor when sale repudiated by either seller or buyer) ; (*Mt.*) *Ojheeonissa B.* v. (*Sheikh*) *Rustom Ali*, [1864] W. R. 219. Some Shia authorities hold that option to seller does not prevent right from arising immediately.

[14] *Gurdiyal Mundar* v. *Teknarayan S.*, (1865) Beng. L. R. (SUPP. VOL.) 166 = 2 W. R. 215 (F. B.—Bayley, J., dissenting) ; *Bhowanee Pershad* v. *Purshunno S.*, (1869) 11 W. R. 282. But on foreclosure, pre-emption claimable : cf. *Batul B.* v. *Mansur Ali*, (1901) 24 All. 17 (after year of grace has expired, notwithstanding that decree for possession not obtained) ; *Tara Kunwar* v. *Mangri Mecan*, 6 Beng. L. R. (APPX.) 114. Right to claim preferentially in regard to LEASE & MORTGAGE may be given by contract or custom, & will be enforced accordingly.

[15] *Lalji Miser* v. *Jaggu Tiwari*, (1910) 33 All. 104 (pre-emption clause of *wajibu'l-arz* may, of course, include perpetual lease) ; *Ahmed Ali K.* v. *Ahmed*, [1866] 1 Agra H. C. R. 101 (lease for 8 years—pre-emption hardly proper term for it : Spankie & Turnbull, JJ., refer to it as preferential claim).

[16] *Manick C.* v. *Bishaishar B. S.*, (1867) 2 Agra 99.

[17] *Dewanutulla* v. *Kazem Molla*, (1887) 15 Cal. 184, *Moorooly Ram* v. *Huree Ram*, (1867) 8 W. R. 106.

[18] *Dewanutulla* v. *Kazem Molla*, (1887) 15 Cal. 184 ; *Ram Golam S.* v. *Nursing Sahoy*, (1875) 25 W. R. 43 ; *Moorooly Ram* v. *Huree Ram*, (1867) 8 W. R. 106 (rent of one rupee per year) ; *Sheikh Mohammad Jamil* v. *Khub Lal Raut*, (1920) 5 Pat. L. J. 740 ; (*Mt.*) *Bibi Saliha* v. *Haji Amiruddin*, (1928) 8 Pat. 251 (Sultan *Ahmad* J.'s decision preferred to his argument as counsel).

[19] Sec. 527 referred to : *Enatulla* v. *Kowsher Ali*, (1926) 54 Cal. 266, 276, 277 (F. B.).

[20] Oudh Laws Acts, s. 9 : lots to be cast in such a case. Punjab Pre-emption Act, 1913, s. 17 under 5 heads for course to be followed. (Under Punjab Laws Act,

**SECTION 527.** in degree [21] to those of the buyer [22] stand in respect of pre-emption [23] on a footing of equality, and the property is divided equally amongst the buyer and all such persons.[24]

***Illustration.*** S, B, and P are co-sharers in the land ; one co-sharer, S, sells his share to another co-sharer, B. The earlier decisions of the Calcutta High Court denied to the co-sharer, P, the right to pre-empt, but those cases are now overruled : [25] B and P will take the property in equal shares. The same results follow where B and P are khalits of S, participating in a right of way.[26]

Three classes of cases would fall within s. 527 : where the pre-emptor and the buyer are both co-sharers of the seller, or they are both khalits, or both neighbours.

Co-parceners, have the right not only to prevent the intrusion of an outsider, but to purchase the share of another co-parcener in equal proportions, whenever any co-parcener wishes to alienate his share.

1872, (now repealed) s. 12 : vendor or mortgagor to determine which of several persons equally entitled shall claim pre-emption). See s. 557, pp. 726 ff.

[21] If they become equal by purchaser buying share *pendente lite* : see s. 541 E, p. 709.

[22] I.e. if buyer is co-sharer then other co-sharers may pre-empt : if buyer is *khalit*, other *khalits* (as well as co-sharers) may pre-empt : if buyer is neighbour, other neighbours (as well as co-sharers & *khalits*) may pre-empt. See also, s. 540.

[23] "The right of all is equal" : Hed. 549 : the right ought really to be called right of joint purchase,—*co*-emption (in its etymological not its conventional sense) *with* the purchaser not *pre*-emption : under s. 527, the so-called pre-emptors do not have prior but equal right of purchase : s. 527 is accordingly stated in form simplifying position. Hed. 540 provides for safeguarding rights of absent pre-emptors equal in degree. See *Enatulla* v. *Kowsher*, (1926) 54 Cal. 266. See s. 540(2), p. 703.

[24] *Bahr-ur-Raiq*, Bk. on Pre-empn. Part. II. Egyp. ed. 143, 161 : *Raddu'l Muhtar*, v. 163, 152 : *Fatawa Alamgiri*, IV. 15, 16 (ch. 6) ; *Inayah* & *Durru'l-Mukhtar* : cited in *Amir Hasan* v. *Rahim Baksh*, (1897) 19 All. 466 (pre-emptor, *khalit* : property divisible equally *per capita* : Bail. I. 494 (500), s. 547, pp. 716 f.) ; *Enatullah* v. *Kowsher A.*, (1926) 54 Cal. 266 (F. B.) ; *Vithaldas Kahandas* v. *Jamietram*, (1920) 44 Bom. 887 (F. B.) ; *Muhammad Yakub* v. *Kanhai Lal*, (1921) 44 All. 83 ; *Ziauddin* v. *Abul Hasan*, (1923) 45 All. 487 ; *Nadir Husain* v. *Sadiq Husain*, (1924) 47 All. 324 (3 months after suit for pre-emption buyer purchased part of land : this purchase was attacked unsuccessfully as being by undue influence : *held* Court may take notice of facts that (i) buyer acquires interests in land, (ii) his acquisition is attacked, (iii) attack unsuccessful) ; *Masihuddin Ahmed* v. *Munir Ahmad*, (1925) 1 Luck. 29, Raza, J., LOTS ordered to be cast : cf. Oudh Laws Act, XVIII. of 1876, s. 9. (See s. 557, p. 726). *Abdulla* v. *Amanutullah*, (1899) 21 All. 292 (*Amir Hasan's* case 19 All. 466 followed : in such cases plaintiff need not sue for whole land sold, but for proportionate part : s. 540). For cases under *wajibu'l-arz*, see s. 524 C. Under AGRA PRE-EMPN. ACT (Local) XI. of 1922 where buyer is on same footing as pre-emptor there is no right of pre-emption (or co-emption) & property not divided between them : *Ashraf B.* v. *Muhammad Abdul Raoof*, (1927) 50 All. 404, 407.

[25] *Lalla Nowbat Lal* v. *Lalla Jewan Lal*, (1878) 4 Cal. 831 (no pre-emption where buyer is co-sharer with seller in land, nor unless pre-emptor has priority over buyer under s. 545, (p. 714) ; reason for pre-emption : to prevent introduction of disagreeable strangers as co-sharers or neighbours, which reason does not hold where buyer is already co-parcener) ; followed in *Gokaldas* v. *Partab*, (1916) 18 Bom. L. R. 693 which latter case was overruled in *Vithaldas Kahandas* v. *Jamietram*, (1920) 44 Bom. 887 (F. B.) : earlier Calcutta decisions ; *Baboo Moheshee Lal* v. *Christian*, (1866) 6 W. R. 250 ; *Teeka Dharee S.* v. *Mohur S.*, (1866) 7 W. R. 269 : overruled by *Enatullah* v. *Kowsher Ali*, (1926) 54 Cal. 266 (F. B.) (where authorities again considered).

[26] *Amir Hasan* v. *Rahim Baksh*, (1897) 19 All. 466 ; *Abdullah* v. *Amanatullah*, (1899) 21 All. 292.

SECTION 527. Right forfeited by pre-emptor joining an outsider as co-purchaser.

Where the buyer is a co-sharer who has associated a stranger [27] with himself in the purchase of a share, then another co-sharer is entitled,[28] at his option, to pre-empt [29] either the whole of the share sold, or the portion sold to the stranger,[29] since the joint owner forfeits his right as sharer by joining an outsider as a purchaser : [30] even though the portions or interests respectively purchased by the co-sharer and the stranger are specified severally in the sales deed.[31] On this last point, however, the decisions were dissented from [32] and overruled [33] in Allahabad. Nine co-owners were defendants in a suit for pre-emption. Three of them compromised with the pre-emptor. One of those who had not compromised was not allowed to treat the compromise as a sale, and claim pre-emption. The right is not affected by a decree obtained by one whose right was inferior to the pre-emptor's in a suit to which the pre-emptor was not a party.[34] Conversely, where the buyer has associated with himself in the purchase another co-sharer, and the rights of that co-sharer are inferior to those of the plaintiff in a pre-emption suit, the plaintiff will obtain a decree for pre-emption as against the whole property ; in other words, a buyer "although having an equal right with the plaintiff loses his right when he brings in as a co-vendee a co-sharer having an inferior right." [35]

## § 3.—PRELIMINARY CEREMONIES : THREE TALABS

I. FORMALITIES. The three talabs.

**528.**[1] Except [2] as hereinafter provided,[3] pre-emption cannot be enforced unless the pre-emptor takes each of the three steps mentioned in ss. 528 A, 528 B, 528 C, the first two of which are referred to as the "preliminary ceremonies."

(A) Immediate assertion : talab-i-muathibat.

**528 A.**[1] The pre-emptor must (subject to s. 528 D) assert his claim [4] immediately [5] on getting information of the sale : [6]

[27] "Stranger" = person inferior in respect of right to pre-empt to person claiming pre-emption (s. 522) : *Guptishwar Ram* v. *Rati Krishna Ram*, (1912) 34 All. 542.

[28] *Harjas* v. *Kanhya*, (1884) 7 All. 118. See *expl.* & s. 531, *ill.* (5).

[29] *Saligram S.* v. *Raghubardyal*, (1887) 15 Cal. 224.

[30] *Ganeshee Lall* v. *Zaraut Ali*, (1878) W. 343 ; *Munna S.* v. *Ramadhin S.*, (1881) 4 All. 252.

[31] *Shevbharos Rai* v. *Jiach R.*, (1886) 8 All. 462, 464, *per* Mahmood, J., explaining *Shewdyal Ram* v. *Bhyro Ram*, [1860] S. D. A. (N. W. P.) 53.

[32] *Ram Nath* v. *Badri Narain*, (1896) 19 All. 148 (three Judges). *Mushtaq Ahmad* v. *Amjad Ali*, (1896) 19 All. 311 ; *Bhupal Singh* v. *Mohun Singh*, (1896) 19 All. 324.

[33] *Abdur Razzaq* v. *Mumtaz Husain*, (1903) 25 All. 334.

[34] *Raj Narain Rai* v. *Dunia Pande*, (1910) 32 All. 840.

[35] *Guptishwar Ram* v. *Rati Krishna Ram*, (1912) 34 All. 542. See s. 531, *ill.* (5), p. 696. Apparently giving full effect to the maxim *nosce ex sociis*.

[1] Sects. 528 to 530 must be read together. Several of them formed one section in first edition. They explain requirements for enforcement of pre-emption together with some closely allied points. Whole subject compendiously treated in s. 528 I, *ill.*, & com., pp. 688-690. See also ss. 529, (p. 691), 522(2)(*e*) (p. 663).

[2] See Punjab Pre-emption & Oudh Laws Acts, cited below : s. 557, p. 726.

[3] See s. 528 D, p. 686, (omission of assertion mentioned in s. 528 A).

[4] FORM of FIRST DEMAND, see s. 528 I, *ill.* (1), p. 688. He must state not merely that the right exists, but that he claims pre-emption ; hence, saying that he is *shafi*

SECTION 528A. such assertion is technically called the 'talab-i-muathibat.'[7]

(B) Confirmatory demand : talab-i-ish-had : before

**528 B.**[8] The pre-emptor must, as soon as practicabe,[9] confirm the assertion (s. 528 A) by making a (second) demand[10] (talab-i-ishhad) for pre-emption. The second demand must include a declaration of his having already asserted his claim ;[11] and must be made in the presence—

(1) Witnesses.

(*a*) of two[12] witnesses[13] [expressly called[14] upon to bear

[without other circumstances] not enough ; Bail. I. 482, (*ll.* 3, 4) (488). See *per* K. Husain, J., *Muhammad Nazir K.* v. *Makhdum Bakhsh*, (1911) 34 All. 53 reversed *ibid.* p. 55 ; *Chakauri Devi* v. *Sundari Devi*, (1905) 28 All. 50 ; *Mangru* v. *Parsotam Das*, [1920] 18 All. L. J. 1037 (saying "I have a right of pre-emption, how will the buyer take it," not enough to satisfy, s. 528 A); *Saiduddin* v. *Mohiuddin*, [1929] AIR (ALL.) 556 = 27 All. L. J. 857 (to say "I am pre-emptor & shall pre-empt" enough but merely to say, "I am the *shafi* (pre-emptor) is not enough : it is enough to say : "I shall or do claim, or have claimed *shafa* (pre-emption)").

[5] *Baijnath Gaonka* v. *Ramdhari Co.*, (1908) 35 I. A. 60 (CAL.) (DELAY EXPLAINED : utmost PROMPTITUDE necessary : any unreasonable or unnecessary delay being construed as election not to pre-empt) ; *Lal Mahammad Sarkar* v. *Husain Mahammad*, (1924) 29 C. W. N. 400 (delay caused by pre-emptor running to house of his co-sharer, instead of asserting at once & immediately on spot where he got information, fatal) ; *Qazi Rahim Baksh* v. *Bachauna*, [1930] 28 All. L. J. 711 (interval between 1st & 2nd demands ; 1st not made on premises nor in presence of vendors or vendees : no reference in 2nd to 1st : demands defective) ; *Mahanth Tokh Narayn Puri* v. *Ram Rachhya Singh*, (1925) 5 Pat. 96, 105 (delay may be explained : waiting to perform second ceremony till purchase price ascertained, justified).

[6] Hed. 550 ; I. 481-483 (487-489) ; II. 183 (par. 4) 195 (par. 2) ; sec s. 529, p. 691 : invalid if made before sale completed : s. 533, p. 698. *Muhammad Askari* v. *Rahamtullah*, (1927) 49 All. 716 (mere notice that property going to be sold on certain date does not operate as estoppel, or deprive of right to pre-empt after actual sale) ; *Nareschandra Datta* v. *Gireeschandra Das*, (1935) 62 Cal. 979 (knowledge of sale, viz. when deed can be said to be a registered one) ; *Kheyali Prasad* v. *Mullick Nazarul Alam*, (1916) 1 Pat. L. J. 174 (payment & delivery not enough as they do not complete the sale).

[7] *Talab* = requisition, demand : *muathibat*, lit. = jumping up. See s. 529, com., p. 692.

[8] Sect. 528 B cited & applied : *Mohammad Raza Ali* v. *Md. Israr Hasan K.*, [1929] AIR (ALL.) 459 = 29 All. L. J. 531 (Sulaiman & King, JJ.) : *Imamuddin* v. *Muhammad Rais-ul Islam*, (1930) 52 All. 1005 (view expressed in s. 528 B, *n.* against express invocation of witnesses adopted). See p. 683, *n.* 1.

[9] *Jadu Lal* v. *Janki Koer*, (1908) 35 Cal. 575 ; 39 Cal. 9151 = 39 I. A. 101 ; *Nuraddin Mahomed* v. *Asgar Ali*, (312) 12 C. L. R. 312 ; *Jamilan* v. *Latif Hossein*, (1871) 8 Beng. L. R. 160 = 6 W. R. (F. B.) 13 ; *Mahomed Waris* v. *Hazee Emamooddeen*, (1866) 6 W. R. 173 ; (*Sheikh*) *Imamuddin* v. (*Mussamat*) *Shah Jan Bibi*, (1870) 6 Beng. L. R. 167 ; *Mohammad Raza A. K.* v. *Md. Israr Hasan K.*, [1927] AIR (ALL.) 459 = 27 All. L. J. 531 (delay of six months after first demand fatal).

[10] Right lost if *talab-i-ishhad* (demand) not made in due FORM : s. 528I, *ill.* (3) ; or (5), p. 688 f., for form. This separate overt act essential : *Jhotu S.* v. *Komul Roy*, (1868) 10 W. R. 119 ; *Razeeooddeen* v. *Zeenut B.*, (1867) 8 W. R. 463 ; *Muhammad Ahmad S. K.* v. *Madho Prasad*, (1916) 39 All. 133. Cf. *Ganga Prasad* v. *Ajudhia Prasad*, (1905) 28 All. 24.

[11] See s. 528 I, *ill.* (3), *n.*, pp. 688 f. ; *Sadiq Ali* v. *Abdul Baqi K.*, (1923) 45 All. 290 (OMISSION, in 2nd demand, to CALL ATTENTION OF WITNESSES to having already made 1st demand, fatal).

[12] Not necessary to produce BOTH WITNESSES : but fact that there were such witnesses who can bear testimony, must be satisfactorily proved : *Imamuddin* v. *Md. Rais-ul Islam*, (1930) 52 All. 1005, 1010. See *nn.* 14, 15.

[13] SERVANTS OF PRE-EMPTOR competent witnesses & all persons who are not

witness to it][15] and in the presence,—

(*b*) either of the seller[16] (if he is in possession of the land)[17] or of the buyer,[18] or on the land ;[19]

SECTION 528 B. (2) Seller, or purchaser, or land.

menials & not convicted of slander : *Muhammad Yunus K.* v. *Muhammad Yusuf*, (1897) 19 All. 334.

[14] "The INVOCATION OF WITNESSES is not required to give validity to that demand, but only in order that the pre-emptor may be provided with proof :" Bail. I. 483 (par. 2) (489); Hed. 551, (col. i. par. 4); but see Hed. 561, (col. i. par. 3); hence in India no witnesses ought, in strictness, to have been required ; cf. Ind. Ev. Act, s. 134, & so it was held in *Imamuddin* v. *Md. Rais-ul-Islam*, (1930) 52 All. 1005 (not absolutely necessary for pre emptor to call upon witnesses to bear witness to this) : see *n.* 15 A. But held otherwise in cases cited in *n.* 15-B(i)-(viii).

[15] A.—SPECIFIC INVOCATION OF WITNESSES NOT NECESSARY : enough, if witnesses are provided for the purpose & accompany pre-emptor & are present. Words in [ ] ought to be omitted in accordance with : (i) *Imamuddin* v. *Md. Rais-ul Islam*, (1930) 52 All. 1005, 1010 (immaterial whether WITNESSES brought by pre-emptor, from his house, or picked up on way, or chosen from those present with buyer : but at least 2 witnesses necessary to support pre-emptor : their mere presence, if they were inattentive & did not hear demand made, so as to be unable to give evidence in support of it, would be insufficient ; but so long as they heard demand being made & can bear testimony to it, no defect in demand); (ii) *Chotu* v. *Husain Bakhsh*, [1893] All. W. N. 101 ; (iii) *Muhammad Yunus K.* v. *Md. Yusuf*, (1897) 19 All. 334 ; (iv) *Ahmad Hakim* v. *Md. Hikmatullah*, (1926) 49 All. 385. B.—SPECIFIC INVOCATION OF WITNESSES NECESSARY : (i) *Isur Chunder Shaha* v. *Mirza Nisar Hossein*, [1864] W. R. 351 : (ii) *Ganga Prasad* v. *Ajudhia Prasad*, (1905) 28 All. 24 ; (iii) *Abdur Rahim* v. *Maidhar Gazi*, (1928) 32 C. W. N. 1163, 1165 ("be therefore witnesses therefor"); (iv) *Prokas S.* v. *Jogeswar S.*, (1868) 2 Beng. L. R. (A. C.) 12 ; (v) *Jadu S.* v. *Raj Kumar*, (1870) 13 W. R. 177 = 4 Beng. L. R. (A. C.) 171 ("calling upon others to be witnesses thereof"); (vi) *Dayamoollah* v. *Kirtee Chunder Surmah*, (1872) 18 W. R. 530 ; (vii) *Golakram Deb* v. *Brindaban Deb*, (1870) 6 Beng. L. R. 165 = 14 W. R. 265 ; (viii) *Ramdular Missir* v. *Jhumack Lal*, (1872) 8 Beng. L. R. 455. See s. 528 I, *ill.* (5).

[16] *Golakram* v. *Brindaban*, (1870) 6 Beng. L. R. 165 = 14 W. R. 265 : see s. 528 I. *ill.* (5) (where seller refuses). Cf. *Sham Lall Sahoo* v. *Ajfuroonissa*, (1874) 22 W. R. 184.

[17] *Inayat K.* v. *Muhammad Yusuf*, (1912) 10 All. L. J. 92 : (*talab-i-ish-had* made in presence of seller & 2 witnesses held invalid, seller not being then in possession).

[18] Hed. 551, 561, (col. i. par. 3); Bail. I. 483-484 (489-490). *Aliman Begam* v. *Ali Husain*, (1923) 45 All. 449 (if more purchasers than one : demand must be made in presence of all); but see *Muhammad Askari* v. *Rahmatullah*, (1927) 49 All. 716 (shares of all purchasers need not be pre-empted, & if demand made to one purchaser only, decree can be had in respect of only that purchaser's share). There is difference of opinion after buyer has taken possession of land :—(i) *may* demand of claim be made in presence of seller ?—as stated to be held by Imam Md. in *Jama Kabir* on "a liberal construction, though not on analogy," or (ii) *must* it be made either in presence of purchaser or on premises ?—as stated in Hed. 551 (col. i. par. 1), cf. *Janger Md.* v. *Md. Arjad*, (1879) 5 Cal. 509 ; (in presence of buyer though he had not taken possession); *Chamroo* v. *Puhlwan*, (1871) 16 W. R. 3 (it must be in presence of person in possession),—which (if it means that it cannot be made in presence of buyer unless he is in possession seems incorrect, &) explained away in *Ali Muhammad Khan* v. *Muhammad Said H.*, (1896) 18 All. 309. *Mahomed Waris* v. *Hazee Emamooddeen*, (1866) 6 W. R. 173 (delay of one day not fatal).

[19] *Kulsum B.* v. *Faqir Muhammad K.*, (1896) 18 All. 298 (undivided 1/8 of zamindari sold : demand may be made on any part of whole zamindari ; but if pre-emptor purposely goes to uninhabited & distant part to avoid its coming to ear of buyer, the demand might be held not to be *bona fide* or good); *Muhammad Usman* v. *Md. Abdul G.*, (1911) 34 All. 1 (demand from pre-emptor's own *chabutra*, which was held to form part of land sold, there being only "imperfect partition," so demand held valid). But where *talab-i-ishhad* made neither in presence of buyer nor seller, nor on land, it is invalid as such ; *Jadunandan S.* v. *Dulput S.*, (1884) 10 Cal. 1008 ; *Rujjub A. C.* v. *Chundi C. B.*, (1890) 17 Cal. 543 (F. B.).

SECTION 528 B. such a demand is technically called the 'talab-i-ishhad' or 'talab-i-taqrir.'[20]

(C) Enforcement talab-i-tamlik.

**528 C.**[1] The pre-emptor must enforce[21] the demand referred to in s. 528 B, by instituting a suit—[22]

(*a*) within a year of the purchaser taking possession of the land ;[23] or

(*b*) where the subject of pre-emption does not admit of physical possession, within a year of the instrument of sale being registered :[24]

such enforcement is technically called the 'talab-i-tamlik,'[25] or 'talab-i-khusumat.'[25]

II. INCIDENTS OF TALABS.

(A) Talab-i-muathibat when not necessary.

**528 D.**[1] (1) Though the assertion of the claim (s. 528 A) has not been made, the right of pre-emption may be claimed provided that the (second) demand (s. 528 B) is duly made at the time when the assertion ought to be made, viz. immediately on the pre-emptor being informed of the sale.[26]

(Shia-law) talab-i-muathibat.

(2) *Quaere,* whether under Shia law any immediate assertion or 'talab-i-muathibat' is necessary so long as the demand is made without unreasonable delay.[27]

(B) Sale on credit.

(3) Abu Yusuf holds that in a sale on credit, the pre-emptor need not (under Hanafi law) assert his claim until the time arrives at which the price is to be paid.[28]

(C) Information of sale to pre-emptor.

(4) Under Shia law the pre-emptor need not assert his

20 *Taqrir* = affirmation : *ish had* = testimony.

21 Bail. I. 484-485 (490-491); Hed. 550-551 ; cf. s. 528 I, p. 688.

22 Suit for possession : not mere declaratory suit, which is obnoxious to Spec. Rel. Act, s. 42 ; see *Charan Das* v. *Amir K.*, (1920) 47 I. A. 255 (N. W. PROV.).

23 Ind. Limit. Act X. of 1908, art. 10 : cf. *Ameer Ali* v. *Bhabo Soonduree Debia*, 6 W. R. 116 (case of conditional sale): *Raj Narain Rai* v. *Dunia Pande*, (1910) 7 All. L. J. 259 (meanwhile another pre-emptor bringing suit, or obtaining decree for pre-emption does not affect period of limitation); *Mehdi Hasan* v. *Baghcha Pande*, (1915) 13 All. L. J. 383 (do.).

24 See *n.* 23. *Batul Begum* v. *Mansur Ali*, (1901) 24 All. 17, (no instrument of sale & subject of pre-emption not admitting of physical possession, art. 120 will apply, not art. 10, i.e. 6 years period of limitation); *Kaunsilla* v. *Gopal*, [1906] 26 All. W. N. 73.

25 *Tamlik* = ownership : see s. 348, com. *Khusumat* = contest.

26 Bail. I. 484 (par. 2) (490); *Abdur Rahim* v. *Maidhar Gazi*, (1928) 32 C. W. N. 1163 (the two demands, viz. under ss. 528 A & 528 B, may be combined); *Koromali* v. *Amir Ali*, (1878) 3 C. L. R. 166 ; *Muhammad Usman* v. *Muhammad Abdul Ghafur*, (1911) 34 All. 1. Cf. s. 528 A, *ill.* (5).; *Nundo Pershad* v. *Gopal Thakur*, (1884) 10 Cal. 1008.

27 Cf. Bail. II. 195 (par. 2) (even being present at time of sale & congratulating purchaser does not extinguish claim); Bail. II. 184 (par. 2); cf. *Jai Kuar* v. *Heera Lal*, (1870) 7 N. W. 1 (assertion unnecessary). Cf. s. 528 F, *nn.*

28 Hed. 556 (col. i.). See s. 554.

claim (by the 'talab-i-muathibat') unless information of the sale reaches him through trustworthy sources. Abu Hanifa's exposition of Hanafi law[29] agrees with Shia law, but Abu Yusuf and Imam Muhammad (whose exposition of Hanafi law is said to be the most correct) hold that the claim must be asserted by the pre-emptor, as soon as he is informed of the sale, and notwithstanding that he does not believe the information to be true.[29] SECTION 528D.

**528E.**[1] Under Shia law the pre-emptor must know the price at which the land is sold before he can validly claim to pre-empt,[2] and he may pray to the Court to determine the sum in fact agreed upon as the price between the buyer and seller,[3] and to decree his claim to pre-empt contingently on his paying the said price ;[4] provided that in such a case the burden is on the pre-emptor to show that the price in fact agreed upon is less than the stated price.[5] (D) Knowledge of price. Prayer that price be determined.

**528F.**[1] The formalities (if any)[6] with which a claim to pre-empt based on custom or contract, must be asserted, demanded, and enforced, are determined by an interpretation of the particular custom or contract.[7] (E) Special custom or contract.

[29] Hed. 551 ; Bail. I. 482-483 (488-489); II. 195 (par. 3); cf. s. 531, *ill.* (3).

[1] See p. 683, *n.* 1.

[2] Bail. II. 188 (*second*); (*a*) *Semble*, this saves pre-emptor's claim so long as he is not informed of price. (*b*) *Quaere*, whether it gives him right to be informed of price). (*c*) On deception or misinformation, his waiver or non-prosecution of his claim does not affect validity of his claim. Cf. *Abadi Begam* v. *Inam Begam*, (1877) 1 All. 521 (not Shia case). See s. 530B, p. 694.

[3] *Lajja Prasad* v. *Debi Prasad*, (1881) 3 All. 236, referring to *Eshri Das* v. *Binda Prasad*, (1861) S. D. A. (N. W. F.) Vol. 1, Part II, 892. Cf. *Abadi Begam* v. *Inam B.*, (1877) 1 All. 521 ; *Bhairon Singh* v. *Laiman*, (1884) 7 All. 23.

[4] But he must offer to pay same price & to take land on same terms as buyer. *Achurbur Panday* v. *Buchshee Ram*, (1864) 2 W. R. 38 ; *Kudhara* v. *Khuman Singh*, [1866] 1 Agra H. C. R. 265 ; *Durga Prasad* v. *Nawazish Ali*, (1878) 1 All. 591 (omission to aver in plaint willingness to pay actual amount of purchase-money not allowed to be remedied by amendment at last stage); *Naubat Singh* v. *Kishan Singh*, (1881) 3 All. 753 (1 All. 591 distinguished).

[5] But the presumption would be very light, cf. Ind. Evid. Act, s. 106 : "When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him." *Abdul Majid* v. *Amalak*, (1907) 29 All. 618 ; *Bhagwan Singh* v. *Mahabir S.*, (1882) 5 All. 185. See s. 530B, *n.*

[6] *Fukeer Rawoot* v. *Emambaksh*, [1863] W. R. (F. B.) 143 = Beng. L. R. SUPP. VOL., 35, approved, in *Jadu Lal* v. *Janki Koer*, (1912) 39 I. A. 101 = 39 Cal. 915 affirming (1908) 35 Cal. 375, 585 (enforcement by suit must always be preceded by observance of forms prescribed in Muhammadan law); cf. *Sheojutlun Roy* v. *Anwar Ali*, (1870) 13 W. R. 189.

[7] *Jai Kuar* v. *Heera Lal*, (1874) 7 N. W. 1 (assertion unnecessary by custom of Hindus of Muhalla Abupura in town of Muzaffarnagar); *Zamir Husain* v. *Daulat Ram*, (1882) 5 All. 110 ; cf. *Ram Prasad* v. *Abdul Karim*, (1887) 9 All. 513 ; *Abdul Khan* v. *Shakira B.*, (1927) 50 All. 348. *Jagjivan Haribhai* v. *Kalidas Mulji*, (1920)

SECTION 528 G.

(F) Price :
(1) not to be tendered when asserting.

**528 G.**[1] The pre-emptor need not tender the price at the time of asserting or demanding pre-emption.[8]

(2) non payment of by appellant.

**528 H.**[1] The pre-emptor's right to appeal from a decree allowing pre-emption and specifying a day on or before which the price shall be paid, is not affected by his failure to pay it on or before the said day.[9]

(G) Talab-i-tamlik unnecessary if voluntary transfer.

**528 I.**[1] It may be unnecessary to institute a suit for the enforcement of pre-emption : as where, on the pre-emptor claiming it, its subject is voluntarily transferred to him.

*Illustrations.*

(1) *Talab-i Muathibat or assertion of claim* (*first ceremony* : s. 528 A) need not be in any particular form.[10] It may be made in the following terms : "I have demanded or do demand pre-emption."[11] Where the words uttered are ambiguous, it may, from the circumstances under which they are uttered, and the acts of the parties immediately following the utterance,[12] be inferred that the claim is made.

(2) P receives information of the sale by letter. The information is contained in the beginning or middle of the letter. He reads it on to the end without assertion of his claim : The right (according to some exponents of Hanafi law) is lost,[13] but according to others and according to Shia law the right is not lost so long as the pre-emptor uses all proper diligence so far as is customary : so that for making the assertion he need not hurry on a journey, or interrupt or delay his prayers or any religious duties.[14]

(3) '*Talab-i-ishhad or demand of the claim*[15] (*second ceremony*) may[16] be

45 Bom. 604 (though Hindus in Surat subject to pre-emption as to HOUSES, doubtful if pre-emption adopted as to AGRICULTURAL LAND).

[8] *Khojeh Jan B.* v. *Mahomed Mehdee*, (1868) 10 W. R. 211 ; *Karim Baksh* v. *Khuda B.*, (1894) 16 All. 247 ; *Nundo Pershad T.* v. *Gopal T.*, (1884) 10 Cal. 1008, 1018 ; *Lajja Prasad* v. *Debi*, (1881) 3 All. 236 ; *Heera Lall* v. *Moorut L.*, (1869) 11 W. R. 275 ; *Bulbood Singh* v. *Mahadeo Dutt*, (1865) 2 W. R. 10 ; *Nubee Buksh, alias Golam Nubee* v. *Kaloo Lushker*, (1874) 22 W. R. 4. "Price" : see s. 522(2)(*a*).

[9] *Kodai Singh* v. *Jaisri E.*, (1890) 13 All. 376 ; *Wazir K.* v. *Kale K.*, (1893) 16 All. 126. "Price" : see s. 522(2)(*a*), p. 663.

[10] *Jog Deb* v. *Mahomed*, (1905) 32 Cal. 982 ; Ameer Ali, *Mah. L.* I. 606, citing no authority, but cited in *Muhammad Nazir K.* v. *Makhdim Bakhsh*, (1911) 34 All. 53, 56, with remark : "he cites abundant authority for this proposition."

[11] Bail. I. 482 (488).

[12] *Muhammad Nazir Khan* v. *Makhdum Bakhsh*, (1911) 34 All. 53.

[13] Hed. 550 (col. ii. par. 3); Bail. I. 481 (487), citing *Hidaya* IV., 992. Cf. *Jarjan Khan* v. *Jabbar Meah*, (1884) 10 Cal. 383.

[14] Bail. II. 184 (par. 2). [15] See s. 528 B, p. 684.

[16] Not necessarily in any particular form : *Jog Deb* v. *Mahomed*, (1905) 32 Cal. 982 ; *Ramdular Misser* v. *Jhumack Lal Misser*, (1872) 8 Beng. L. R. 455 = 17 W. R. 265 ; *Girdharee Singh* v. *Rojun Singh*, (1875) 24 W. R. 462 (declaration ought to be made before witnesses in substance to effect that first assertion had been made); *Nundo Pershad Thakur* v. *Gopal Thakur*, (1884) 10 Cal. 1008 (Garth, C. J. & Beverley, J. held that if first assertion made in presence of witnesses, & same witnesses present at second demand (*ishhad*), it is unnecessary for pre-emptor on second occasion to declare that he had already asserted claim by *talab-i-muathibat*), overruled in (i) *Rujjub Ali Chopedar* v. *Chandi Churn Bhadra*, (1890) 17 Cal. 543 (F. B.) (both, declaration of having made first assertion, & invocation of witnesses, necessary);

made in these terms : "B has purchased this mansion, and I have demanded the pre-emption,[17] and now do demand it : bear ye witness to this." [18]

(4) *'Talab-i-khusumat' or 'talab-i-tamlik' or enforcement* [19] of the claim may be obtained by a prayer in the following terms : "B has purchased a mansion" (describing its situation and boundaries), "and I am the shafee by reason of a mansion belonging to me," (the boundaries of which he should also explain). "Order him, therefore, to deliver it up to me." [20]

(5) P makes the talab-i-muathibat in the presence of witnesses, but in doing so, he is neither at the land, nor in the presence of the seller or buyer ; this does not operate as a valid talab-i-ish had, since "it is not shown that the first talab was made in the presence of either the seller or the purchaser or at the premises which constituted the subject of this sale." [20]

(6) P claims to purchase a specific quantity of land at a specific price ; this is not a proper claim to pre-empt, which must be made with an offer to pay the real price whatever it be.[21]

(7) P claims to pre-empt at the real price, alleging that the stated price (viz. Rs. 1,200) is fictitious, and the real purchase-money was Rs. 250 ; the first Court holds that the real or market value of the land was Rs. 250 ; this was held sufficient to show that the alleged price of Rs. 1,200 was fictitious [22]—*sed quaere.*

(8) P claims pre-emption, alleging that though the stated price is Rs. 775, the real price was Rs. 75. The buyer, B (a stranger) adduces evidence of the sale-deed ; and P gives evidence that a share in the neighbouring mahal was sold for Rs. 75. There is no other evidence, neither the seller nor the buyer being called. *Held*, that there is no evidence on which the lower Court can find the price to be Rs. 775. The case was remanded for further evidence being taken (*a*) as to the real contract price, or (*b*) as to the market value ; intimating that should neither be proved, no further remand would be granted, as it is a necessary part of the plaintiff's case to prove either (*a*) or (*b*), in order to show that the stated price was fictitious.[23]

(9) P, a pardanishin lady, on being informed by her nephew PA of the sale of the land to B, said : "I am the shafi of the property, how has he

(ii) *Akbar Husain* v. *Abdul Jalil*, (1894) 16 All. 383 (mention must be made of fact that *talab-i-muathibat* has been previously made) ; (iii) *Abbasi Begum* v. *Afzal Husen*, (1898) 20 All. 457 (do.) ; (iv) *Mubarak Husain* v. *Kaniz Bano*, (1904) 27 All. 160 (do.) ; (v) *Abid Husen* v. *Bashir Ahmed*, (1898) 20 All. 499 (do. notwithstanding, that same witnesses present at first assertion).

[17] Bail. I. 483 (489) ; Hed. 551 ; whether specific invocation of witnesses necessary ; see s. 528 B(*a*), p. 685, n. 15.

[18] See ss. 528 B, 528 C, pp. 684, 686.

[19] Bail. I. 485 (491). Muhammadan law gives "OPTIONS OF INSPECTION & DEFECT" : Hed. 553, see s. 549(1) : but see com.

[20] *Jadunandun Singh* v. *Dulput S.*, (1884) 10 Cal. 581 ; *Nathu* v. *Shadi*, (1915) 13 All. L. J. 714 (both DEMANDS may be COMBINED if there are witnesses to *talab-i-muathibat* = second demand). See ss. 528 B & 528 D, pp. 684, 686.

[21] *Achurbur Panday* v. *Buchshee Ram*, (1864) 2 W. R. 38 (no offer to pay real price whatever it might be : offer to purchase specific quantity of land at specific price. Court found quantity of land sold greater & price higher).

[22] *Sheopargash* v. *Dhanraj Dube*, (1887) 9 All. 225. See s. 528 D.

[23] *Agar Singh* v. *Raghuraj Singh*, (1887) 9 All. 471. See s. 528 D.

SECTION 528I. purchased it? Go to him and tell him to give me the property." PA took witnesses to B, and said, "My aunt says that she is the shafi of this land" and then told the persons present that he had told B what his aunt had said; *held*, that the demand (talab-i-ishhad) was not defective on the ground that no reference was made to the first assertion. Had the demand been made by P in person, Aikman, J., said he would have had no difficulty in holding it defective; but looking to the fact that it was made by an agent on behalf of an absent pre-emptor who was a pardanishin lady, the words used by the agent were held equivalent to the statement that P had asserted and was asserting her right of pre-emption.[24]

(10) S sells the land to B, BA, BB, BC, and BD; in making the demand of pre-emption, P says in the presence of BB and BC, "Whereas B and others have purchased the land and I asserted my right of pre-emption," etc., and proclaimed this also at the empty doors of the rest of the buyers; the demand *held* valid.[25]

PRELIMINARY CEREMONIES : SUMMARY.

1.—First assertion talab-i-muathibat

(1) The FIRST ASSERTION of the claim (called 'TALAB-I-MUATHIBAT' see s. 528 A) must be made,—

*a*.—as soon as possible.

(*a*) as soon as possible; this raises a question of fact : the dicta in the reports are not always not consistent or reconcilable. The Courts at times lean against decreeing pre-emption and seize technical objections against it. The Shia law does not require such extreme promptness in asserting the claim. It is doubtful whether it requires the first assertion at all : ss. 528 D(2), 528 I, ill. (2). But there does not seem to be any case decided on this point under Shia law.

*b*.—no special form necessary.

(*b*) No special form is insisted upon with reference to the first assertion, so long as a desire to pre-empt is asserted—not merely statement as a fact of having a right to pre-empt. The surrounding circumstances may be referred to for deciding whether the desire or intention to claim was asserted.

2.—Second demand, talab-i-ishhad.

(2) As to the (SECOND) DEMAND or the 'TALAB-I-SHHAD' (see s. 528 B)—

*a*.—Witnesses

(*a*) witnesses are necessary in India, though strictly in accordance with the texts they seem not to be necessary.

*b*.—presence on land, or of buyer, or seller.

(*b*) The (second) demand must be made either,—

(i) on the land; or

(ii) in the presence of the buyer; or

(iii) (so long as the land is in the possession of the seller) in the presence of the seller; but,—

(iv) it is doubtful whether it may validly be made in the presence of the seller if the buyer has taken possession of the land.

*c*.—form of second demand.

(*c*) It need not be made in any particular form, but it is essential that three matters be given expression to,—

(i) invocation of the witnesses;

[24] *Ahmad Shah K.* v. *Abadi B.*, [1897] 17 All. W. N. 23; relying on *Rujjab Ali* v. *Chundi*, (1890) 17 Cal. 534; *Akbar Husain* v. *Abdul Jalil*, [1894] All. W. N. 122.

[25] *Jog Deb* v. *Mahomed*, (1805) 32 Cal. 982. See n. 10.

(ii) declaration that the first assertion ('talab-i-muathibat') has already been made; SECTION 528I.

(iii) adherence to the desire to pre-empt.[26]

**529.** The assertion (or 'talab-i-muathibat')[27] and the demand (or 'talab-i-ishhad,' or "'talabi-itaqrir')[28] for pre-emption must be strictly proved[29] to have been made in proper form,[30] and without undue[31] delay.[32] (H) Strict proof.

*Illustration.* On 14 Oct. 1910, the plaintiff, an inspector of partition-amins of the Bareilly division, residing at Bareilly, while on tour, heard of the sale at Badaun of a house in the district of Saharanpur. The sale deed was dated 7 Sept. 1910. He immediately performed (1) the 'talab-i-muathibat' in the presence of witnesses. He also purported (2) to perform the talab-i-ishhad by sending to the buyer by post (owing to the buyer being at a distance) a letter signed in the presence of witnesses, claiming the right of pre-emption, and stating that the talab-i-muathibat had been properly made. The letter was duly received by the buyer: *held* that the second demand was not properly made.[33] Agent making second demand. The Court cited Fatawa Alamgiri: "If a pre-emptor comes to know of the sale while he is on his way to Mecca, and makes the talab-i-muathibat, but is unable to perform the talab-i-ishhad personally, he ought to appoint a vakil to make the claim of pre-emption for him. If he cannot find any one whom he may appoint his vakil, but finds a messenger, he ought to write a letter and in this letter he ought to appoint a vakil. If he fails to do so, his right of pre-emption will be lost. But if he can neither find a vakil nor a messenger, his right of pre-emption will not be lost until he finds one."[33] Fatawa Alamgiri. Messenger. The plaintiff proved neither that was unable to perform the talab-i-ishhad himself, nor that he was unable to find any one whom to appoint as his vakil. His

[26] *Baijnath* v. *Ramdhari*, (1908) 35 Cal. 402 = 35 I. A. 60.

[27] See s. 528 B. *Jarfan Khan* v. *Jabbar M.*, (1884) 10 Cal. 383; *Jhotee Singh* v. *Komul Roy*, (1868) 10 W. R. 119; *Abdul Hossein K.* v. *Gobind Chandra S.*, (1869) 11 W. R. 404.

[28] *Narohase Singh* v. *Luchmee Narain P.*, (1869) 11 W. R. 307; *Razeeooddeen* v. *Zeenut B.*, (1867) 8 W. R. 463; *Bhowanee Dutt* v. *Lokhoo S.*, [1864] W. R. 60.

[29] *Hosseini Khanum* v. *Lallun*, [1864] W. R. 117; *Issur Chunder Shaha* v. *Nissar Hossein*, *ib.* 351; *Jadu S.* v. *Rajkumar*, (1870) 4 Beng. L. R. (A. C.) 171; *Prokas Singh* v. *Jogeshwar S.*, 2 Beng. L. R. (A. C.) 12; *Ali Muhammad* v. *Taj*, (1876) 1 All. 288; *Surdharee Lall* v. *Laboo Moodee*, (1876) 21 W. R. 499; *Imamuddin* v. *Md. Rais-ul Islam*, (1930) 52 All. 1005.

[30] I.e. so far as form necessary: s. 528 I, *ill.* (1), (3), pp. 680 f; *Muhammad Khalil* v. *Muhammad Ibrahim*, (1915) 38 All. 201: see s. 529, *ill.*

[31] See comment, *p.* 692, on what is undue delay.

[32] *Minhaj*, 208 (par. 9) (Bk. 18, s. 2) on Shafi law. *Baijnath* v. *Ramdhari*, (1908) 35 Cal. 402; 35 I. A. 60; *Jarfan Khan* v. *Jabbar Meah*, (1884) 10 Cal. 383; *Ali Muhammad* v. *Taj Muhammad*, (1870) 1 All. 283; *Nazir K.* v. *Inayatulla*, (1893) 12 All. W. N. 24; *Ram Charan* v. *Narbir (Nurhur) Mahton*, (1870) 4 Beng. L. R. (A. C.) 216 = 13 W. R. 259; *Muhammad Wilayat A. K.* v. *Abdul Rab*, (1938) 11 All. 108; *Ajoodhja Pooree* v. *Sohun*, 7 W. R. 428; *Elahee Buksh* v. *Mohan*, 25 W. R. 9; *Gholam Hossein* v. *Abdool Kadir*, (1873) 5 N. W. 11: as to delay in making the DEMAND (ISH HAD), cf. s. 528 B, pp. 684 ff.

[33] *Muhammad Khalil* v. *Muhammad Ibrahim*, (1915) 38 All. 201, 203. The passage cited from *Fatawa Alamgiri* is referred to in Macn., Prec. 183.

SECTION 529. procedure was therefore defective. He could, staying where he was, have appointed a vakil and sent on the vakil, or he could have written a letter appointing a vakil : and he would have been excused the delay caused by the time he spent in finding a vakil and/or messenger for sending his letter of appointment.

The text explained. It is implied above that the actual talab-i-ishhad has to be performed personally by the pre-emptor or his agent,—not by a document such as a letter. Despatching a letter is not performing the ceremony. To hold otherwise would not merely add a new mode of performing the ceremony : it would totally alter the substance of the ceremony. It would mean that no one need go to the land or buyer (or seller) but that the ceremony may be performed by writing. The letter is referred to in the Alamgiri not as a substitute for or mode of performing the ceremony, but as a means for appointing a vakil to perform it. The rule is that delay is excused—"time does not run" during the period—during which the pre-emptor is not able either (*a*) to go himself to the land or to the buyer (or seller), or (*b*) to appoint a vakil for so going,—not that in any circumstances, the ceremony may be deemed to be performed though no person goes to the premises or to the buyer (or seller).

First ceremony. As regards the 'talab-i-muathibat' (s. 528 A)—

Evidence of pre-emptor alone. (1) the question has been raised whether the evidence of the pre-emptor alone is enough to prove its having been made ;[34]

What is undue delay. (2) a lapse before the assertion is made of (*a*) twelve hours,[35] or (*b*) of the night,[36] (*c*) the delay caused by the pre-emptor going either to the land,[37] (the subject of pre-emption) and making the 'talab-i-mutathibat' there, or (*d*) going to his own house to get the purchase-money prior to asserting it,[38] have all been *held* to be fatal to the claim ; (*e*) if the pre-emptor, on hearing of the sale, "enters his house, opens his chest, and takes out Rs. 47-4," and then asserts his claim : there has been held to be such unnecessary delay as to avoid the claim ;[39] but (*f*) rising from the seat[40] before making the claim is not undue delay ; (*g*) taking a short time for ascertaining the correctness of the information is not undue delay ; (*h*) a short time for reflection before making the first assertion has been allowed.[41]

Second ceremony. Delay in making the demand ('talab-i-ishhad'): see s. 528B, *nn*. The Shia law is different. See s. 528 I, *ill*. (2), p. 688.

(I) Preliminary ceremonies by agent, manager or guardian.

**530.** The assertion and demand (or preliminary ceremonies) for pre-emption may be made either by the pre-

[34] *Abdool Hossein K.* v. *Gobind Chandra S.*, (1869) 11 W. R. 404.
[35] *Ali Muhammad* v. *Taj M.*, (1876) 1 All. 283.
[36] *Nazir K.* v. *Inayatulla*, (1893) 12 All. W. N. 24.
[37] *Ram Charan* v. *Narnib Mahton*, (1870) 4 Beng. L. R. (A. C.) 216 = 13 W. R. 259.
[38] *Mona Singh* v. *Mosrad Singh*, (1866) 5 W. R. 203.
[39] *Jarjan K.* v. *Jabbar Meah*, (1884) 10 Cal. 383.
[40] *Maharaj Singh* v. *Lalla Bhanchook Lal*, [1864] W. R. 294.
[41] *Amjad Hussein* v. *Kharag Sen Saha*, (1870) 4 Beng. L. R. (A. C.) 203 = 13 W. R. 299.

emptor, or his duly authorized agent,[1] or manager,[2] or guardian.[3] Any person competent to own property, is competent to be authorized to make the ceremonies.[4] SECTION 530.

Minor and guardian.

Under the Shia texts, if the guardian of a minor or person of unsound mind exercises or refuses to exercise a claim to pre-empt arising in his favour, and if the act or omission of the guardian is not for the benefit of the minor, then the pre-emption may be avoided, or enforced on attaining majority or recovering reason. The Hanafi authorities are doubtful on the point.[5] It is difficult to see how the Shia texts could be given effect to in our times, except in so far as they may affect the rights between the guardian and his ward, or perhaps where the disability of the pre-emptor has not been long in duration and the interests of third parties are not affected. Apart from other difficulties the bearing of the Indian Limitation Act IX. of 1908, s. 8, and Act XV. of 1877, s. 6 and s. 7 (paragraph 5) may have to be considered.[6] Under a wajibu'l-arz restricting pre-emption to persons competent to contract, the plaintiff, who was a minor at the time of the sale, unrepresented by a guardian, was held not entitled to enforce pre-emption by a suit brought on his attaining majority four years later.[6]

Restriction in wajibu'l arz against minor.

(J) TERMS ON WHICH PRE-EMPTION ALLOWED :

(1) terms of sale binding.

**530 A.** The pre-emptor must take the sale[7] as it was made, and cannot alter its terms either as regards the property sold, (see s. 540) or price, or any other essential term, *semble*, not having reference to the personal relation between the seller and buyer.[8]

*Illustrations.*

It is not always easy to distinguish the essential parts of the bargain from arrangements personal to the original buyer and seller, of a kind that cannot be transferred when the pre-emptor steps into the shoes of the original

[1] *Munna K.* v. *Cheddu S.*, (1906) 28 All. 691 ; *Ali Muhammad K.* v. *Muhammad Said Husain*, (1896) 18 All. 309 ; *Harirar Dat* v. *Sheo P.*, (1884) 7 All. 41 (laying down rule in general terms); *Abadi Begam* v. *Inam Begam*, (1877) 1 All. 521 (husband for wife); *Ojheoonissa Begam* v. *Rustam Ali*, [1864] W. R. 219 ; (*Syed*) *Wajid Ali K.* v. *Lala Hanuman Prasad*, (1869) 4 Beng. L. R. (A. C.) 139 ; 12 W. R. (F. B.) 484. AGENTS see com.

[2] *Sri Kishan* v. *Bachcha Pande*, (1911) 32 All. 637 (notice by member of joint Hindu family to accrue for benefit of all); *Jadu Lal* v. *Janki Koer*, (1908) 35 Cal. 575 (manager under Court of Wards); affirmed (1912) 39 I. A. 101 = 39 Cal. 915.

[3] Hed. 564-565 ; Bail. II. 180 ; see s. 271. See s. 530, com. *Amir Haider* v. *Ali Ahmad*, (1925) 47 All. 635 (= s. 530 B, p. 694, n. 16).

[4] Bail. I. 472 (par. 2) (477): "neither are manhood, puberty, & justice or respectability of character, conditions of its exercise."

[5] Cf. *Nanoo* v. *Tirkha*, [1876] S. D. A. (N. W. P.).

[6] *Raja Ram* v. *Bansi Das*, (1876) 1 All. 207.

[7] See s. 522(2)(*a*).

[8] *Madhub Chunder N. B.* v. *Tomee Bewah*, (1867) 7 W. R. 210 ; *Tawakkul Rai* v. *Lachman*, (1883) 6 All. 341 ; *Nihal S.* v. *Kokale S.*, (1885) 8 All. 29 (pre-emptor not to have benefit of PECULIAR INCIDENTS of payment of purchase money as arranged BETWEEN SELLER & BUYER, viz. that balance of purchase money to remain on credit & be secured by hypothecation deeds). See also *Sitaram Bhaurau* v. *Sayad Sirajul K.*, (1917) 41 Bom. 636, affmd. *Sitaram* v. *Jiaul Hasan*, (1921) 48 I. A. 475 ; *Shankar Lal* v. *Hashmi B.*, (1932) 54 All. 1023 & com.

SECTION 530A. buyer. (i) The benefit of an arrangement by which a portion of the price was to remain with the buyer in order that he might pay off a mortgage debt, was held to be personal to the seller and buyer : the pre-emptor was not allowed to claim the same terms ;[9] but (ii) the pre-emptor was allowed a deduction from the price originally fixed, where, after the sale, the seller and buyer agreed that the buyer should recover—as he did—for his own benefit, certain moneys due to the seller at the time of the sale.[10] (iii) The District Court had decreed a conveyance to the pre-emptor upon payment of Rs. 71, (though the price paid by the purchaser was Rs. 141) on the ground that though the seller proposed to sell 5 annas he had only 2½ annas : but the High Court[11] amended the decree by directing a conveyance to the plaintiff on payment of Rs. 141, the full amount of the purchase money : holding that the bargain must be taken as made : " any apportionment of the purchase money is altogether illegal."[12] (iv) But where certain persons purported to sell an 8 annas share of a village, who had title to only 6 annas 8 pies thereof, the owner of the other 1 anna 4 pies first instituted a suit and obtained a decree declaring his title to that share ; then he claimed pre-emption of the other 6 annas and 8 pies, and it was held that he had to pay only a proportional price.[12]

(2) True price and market price.

**530 B.** Where the real price agreed upon between the seller and buyer is in dispute, the proper course is for the pre-emptor (on whom the burden lies) to give some evidence that the alleged price is not the real price. This will shift the burden on the seller and the buyer, within whose knowledge the real price is. The market price may then have some bearing on the question.[13]

Minhaj,[14] (Shafii text) states that in case of disputes between the buyer and pre-emptor as to the price, the presumption is in favour of the buyer's statement : see s. 5 B, pp. 39 ff.

## § 4.—Loss of Right of Pre-emption.

I. OMISSION TO CLAIM : ACQUIESCENCE

**531.** A person otherwise entitled to claim pre-emption, loses that right if he expressly or impliedly waives it,[15] or

[9] (*Sheikh*) *Golam Aykya* v. *Joy Mungul S.*, (1873) 13 W. R. 435.

[10] *Tajammul Husain* v. *Uda*, (1880) 3 All. 668.

[11] *Madhub Chunder N. B.* v. *Tomee Bewah*, (1866) 7 W. R. 210.

[12] *Muhammad Latif* v. *Gobind S.*, (1884) 5 All. 382. See also *Nihal S.* v. *Kokale S.*, (1885) 8 All. 29 noted s. 530 A, *nn.*, p. 693.

[13] *Ram Sarup Sahu* v. *Karamullah K.*, (1914) 36 All. 464 (no actual price); *Agar S.* v. *Raghuraj*, (1887) 9 All. 471 = s. 528 I, *ill.* (8), p. 687. See s. 528 E, *nn.* p. 687.

[14] *Minhaj*, Bk. 18, s. 2. Howard's Transl. 207.

[15] See ss. 533-535, p. 698, dealing with waiver at length. Bail. I. 499, (505), e.g. if he says, " I have made void the " *shufa*," or " have caused it to drop," or " I have released you from it,' or " I have surrendered it to you," whether pre-emptor is or is not aware of the sale, provided however that it has actually taken place.

omits[16] duly[17] to assert demand or enforce his claim,[18] or acquiesces in the sale of the land,[19] or any part thereof,[20] notwithstanding that he may have already asserted and demanded it,[21] or associates in a suit to enforce pre-emption a co-plaintiff who has no claim to it, and in that manner waives part of the claim, and extinguishes the whole of it.[22] SECTION 531.

*Illustrations.* (1) S sells land to B. P, who has a right to pre-emption, on receiving information[23] of the sale,—

(*a*) omits without sufficient cause to claim immediately his right,[24] *or*

(*b*) makes an offer for the house to B,[25] *or*

(*c*) asks him if he will give it up to him,[26] *or*

(*d*) takes a lease of it,[26] *or*

(*e*) agrees to cultivate in muzaraat or jointly with B,[26] *or*

(*f*) on the day of the sale P obtains a written agreement from B to sell to P the land any time within a year, and then P pays the price and purchases it for himself,[26] *or*

(*g*) P acts in the sale, as the agent of the seller,[26]—

in each of these cases P will be taken to have acquiesced in the sale,[27] and loses any right he may have had to pre-empt the land.

(*h*) If P acts as the agent of the buyer, B, P's right is not extinguished,[26]—

(*i*) Nor where an agreement similar to that in (*f*) is entered into while P continues to assert his pre-emptive right, and on the strength of that right, and in his character as pre-emptor, offers, in order to avoid litigation, to take

[16] *Amir Haidar* v. *Ali Ahmad*, (1925) 47 All. 635 (pre-emption suit by uncle & minor nephew : uncle, who was not legal guardian, had consented to sale on behalf of himself & minor : minor not bound by uncle's consent).

[17] PREMATURE ASSERTION is not enough : *Muhammad Yunis K.* v. *Md. Saleh K.*, (1930) 53 All. 169.

[18] See ss. 528, 540, pp. 683, 703. [19] Bail. I. 743 (753).

[20] OMITTING TO SUE FOR PART OF subject is in effect a WAIVER as to that part ; object of right of pre-emption to prevent intrusion of stranger ; not to give pre-emptor " CAPRICIOUS CHOICE " of ousting stranger from so much of land as he may choose to pre-empt (Mahmood, J.) : *Durga Prasad* v. *Munsi*, (1884) 6 All. 423 : s. 540.

[21] Bail. I. 400 (505). See *ill. Sparrow* v. *Cooper*, (1833) Hayes & Jones 404.

[22] *Guptishwar Ram* v. *Rati Krishna Ram*, (1912) 34 All. 542 (= s. 527, pp. 682 f) ; *Bhawani Prasad* v. *Dantru*, (1882) 5 All. 197 ; *Bhupal Singh* v. *Mohan S.*, (1897) 19 All. 324 (such MISJOINDER not allowed to be rectified by amendment of plaint) ; cf. *Bhawani Kuar* v. *Narain Singh*, (1887) 7 All. W. N. 247 ; *Mahanth Tokh Narayn Puri* v. *Ram Rachhya Singh*, (1925) 5 Pat. 96 (JOINING AS CO-PLAINTIFF person who has NO CLAIM to pre-empt causes forfeiture : but joining persons who, not being strangers, had right to pre-empt, but had failed to qualify themselves, does not cause forfeiture).

[23] The more so where *wajibu'arz* required S to give notice, & S did so, but P took no action within reasonable time ; *Muhammad Wilayat Ali Khan* v. *Abdul Rab.* (1888) 11 All. 108.

[24] Bail. I. 499 (505) ; *Kishan Lal* v. *Ishri*, (1905) 28 All. 237.

[25] *Habibunnissa* v. *Barkat Ali*, (1886) 8 All. 275.

[26] Hed. 562 (col. i., par. 4). See under *ill.* (1) (*i*).

[27] *Baijnath Ram Goenka* v. *Ramdhari*, (1908) 35 I. A. 60 = 35 Cal. 402.

SECTION 531. the land from B for the sale price : [28] the distinction between (*g*) and (*h*) is stated to be, that in (*g*), P must annul the sale which was completed by himself in order to pre-empt, whereas in (*h*) he must enforce the sale to B through whom he claims.[28]

(2) Where property is sold in execution of P's decree,[29] or in execution of a decree at a public auction at which P has the same opportunity to bid for the property as other persons, P cannot exercise his right of pre-emption.[30]

(3) P sues for pre-emption, alleging that the real price was less than that stated in the sale deed. P had made no communication to S, the seller, after he became aware that the sale was negotiated for, neither that he claimed to pre-empt, nor that he declined to pay the ostensible price. *Held*, that P ought to have communicated with S, and not having done so, he must be taken to have countenanced the completion of the sale, and waived his right of pre-emption.[31]

(4) PA and PAA obtained decrees for pre-empting, 1/14 and 13/14 shares of the land on the 29 Nov., and 23 Dec. 1907, respectively ; a suit was brought on the 17th Dec. 1907 by P, whose claim, as pre-emptor, was prior to that of PA, and PAA. *Held*, that P was entitled to pre-empt, not having been a party to the suits by PA and PAA, and P's right was not affected by the decrees in favour of PA and PAA.[32]

(5) The sale was to a co-sharer jointly with two others, who were strangers, the consideration being one integral sum : *held* (i) that the co-sharer, having associated with himself strangers as buyers, must be deemed for the purposes of pre-emption, to be himself a stranger ; (ii) the claim of the other co-sharers to pre-empt could not be resisted by him, notwithstanding that the sale deed specified that each of the buyers took 1/3 of the land sold [33] and (iii) a person whose rights to pre-emption are inferior to those of the plaintiff, is deemed to that extent a stranger for the present purpose.[34]

II. DEATH OF PRE-EMPTOR BEFORE ENFORCEMENT : Abatement : Devolution.

**532.** (1) Under Hanafi law the right of pre-emption is extinguished where the pre-emptor dies before enforcing it by suit,[1] even if he has made the two preliminary ceremonies.[2]

[28] *Muhammad Yunus Khan* v. *Muhammad Yusuf*, (1897) 19 All. 334 ; *Muhammad Nasiruddin* v. *Abdul Hasan*, (1894) 16 All. 330.

[29] *Nuzmoodeen Goenka* v. *Kanye Jha*, (1863) Marsh 555 = 2 Hay, 651. But see s. 525, *ill.* (1)(*e*).

[30] *Abdul Jabel* v. *Khelat Chandra Ghose*, (1868) 1 Beng. L. R. (A. C.) 105 = 10 W. R. 165.

[31] *Bhairon Singh* v. *Lalman*, (1884) 7 All. 23.

[32] *Raj Narain Rai* v. *Dunia Pande*, (1910) 32 All. 340. Cf. s. 527, com.

[33] *Manna Singh* v. *Ramadhin S.*, (1881) 4 All. 252. *Harjas* v. *Kanhya*, (1884) 7 All. 118.

[34] *Gupteshwar Ram* v. *Rati Krishna R.*, (1912) 34 All. 542 (s. 527, pp. 682 f) ; cf. *Sparrow* v. *Cooper*, (1833) Hayes & Jones 404.

[1] Hed. 561 (col. ii. par. 2) ; Bail. I. 500 (506) ; *Muhammad Husain* v. *Niamat-unnissa*, (1897) 20 All. 88 ; *Partab Singh* v *Daulat*, (1913) 36 All. 63 ; cf. *Sitaram Bhaurau* v. *Sayad Sirajul Khan*, (1917) 41 Bom. 636, 653 (= *n.* 2). See however *Wajid Ali* v. *Shaban*, (1909) 32 All. 623 (rights under *wajibu'l-arz*).

[2] *Pratab Singh* v. *Daulat*, (1913) 36 All. 63 ; cf. *Sitaram Bhaurau* v. *Sayad*

SECTION 532.

(2) Where the seller informs the pre-emptor of the proposed sale, and notifies him that, if he is desirous of pre-empting, he must pay the price within a stated period, and the pre-emptor exercises the option, giving a formal notice to the seller and asking for the address of the buyer and inspection of the deeds, and thereafter dies, and an administrator of his estate is appointed, the right of pre-emption vests in the administrator.[3]

Administrator.

(3) Under Shia and Shafii law, on the death of the pre-emptor, the right to pre-empt devolves upon his heirs,[4] in the proportion of their rights of inheritance.[5]

Shia Law.

(4) On the death of a Hanafi pre-emptor, pending a suit for pre-emption, his right does not, under the Indian Succession Act, 1925, s. 306 [6] survive to his heirs and representatives who are neither executors nor administrators within the clear definitions of the terms in the said Act.[7]

Effect of Probate Act.

1.—Reason for abatement.

The reason given for the right abating, under Hanafi law, is that the death of the pre-emptor extinguishes his ownership of his property (see s. 541) which is necessary to give rise to the claim : it cannot continue in the dead man ; as for his heirs, their right in the property devolves upon them after his death, i.e. after the sale ; and thus they were not owners at the time of the sale.[8]

2.—Effect of maxim about actio personalis and Probate Act.

The head-notes of both reports [9] of Sayyad Jiaul Hussain's case are (submitted) inaccurate : the Court adjourned the hearing of the appeal on the question of the right surviving to an administrator ; though it said, "we cannot doubt but that the intention of the legislature in the enactment was to make large innovations upon the personal law ... as expressed in the old maxim actio personalis moritur cum persona. Since that in our opinion is unmistakably the effect of s. 89 of the Probate and Administration Act,[6] we think that its operation must be strictly confined to the persons named in it."

Lord Macnaghten's observation [10] that the application of the doctrine of actio personalis moritur cum persona, is limited to actions in which remedy is sought for a tort, or for something which involves at any rate a wrong-doing—

*Sirajul K.*, (1917) 41 Bom. 626, 653, affmd. *Sitaram* v. *Jiaul Hasan*, (1921) 48 I. A. 475 (pre-emption apparently based on contract : p. 480, *ll.* 22-26).

[3] *Sitaram Bhaurau* v. *Jiaul Hasan*, (1921) 48 I. A. 475, 478, 479. See *nn.* 2, 7.

[4] Hed. 561 ; Bail. II. 190, 191 ; the *Shaikh*, i.e. Muhammad-al-Hasan ibn Ali Aba Jafaral-Tusi, author of the *Mabsut*, holds that the right abates.

[5] Bail. II. 191 (*third*).

[6] Ind. Succ. Act, 1925, s. 306 = Prob. & Adm. Act, v. 1881, s. 89.

[7] *Sayyad Jiaul Hussain* v. *Sitaram Bhau*, (1911) 36 Bom. 144 = 13 Bom. L. R. 1340 ; *Sitaram Bhaurau* v. *Sayad Sirajul K.*, (1917) 41 Bom. 636, 653. See com.

[8] Hed. 562 (col. i., par. 1).

[9] 36 Bom. 144 = 13 Bom. L. R. 1340.

[10] *United Collieries Ld.* v. *Simpson*, [1909] A. C. 391.

SECTION 532. was recently cited in deciding that the maxim does not apply where compensation is claimed to property on the strength of express or implied contract.[11] It is difficult to say whether the right of pre-emption as understood by the Hanafi texts falls within the category of tort or contract. It arises in many cases from contract, but its object is to safeguard the pre-emptor from annoyance which may be considered as a species of wrong-doing : s. 522, 528, 528 I, comm., pp. 664, 683, 690.

III. WAIVER.
(A) Express : implied.

**533.** After the right of pre-emption has arisen and before it has been enforced [12] it may be waived expressly or impliedly.

*Illustrations.* S makes an offer of sale to P, who refuses to avail himself of it, and consents to a sale to B ; P cannot afterwards claim to pre-empt.[13] But where there is neither sufficient proof of the refusal, nor evidence of consent to the sale to B, the right is not lost ;[14] nor where there is no absolute surrender, the refusal having been made simply in consequence of a dispute as to the actual price of the land.[15] Is a mere refusal to purchase proof of consent to the sale to B ?[16]

(B) Conditional or contingent waiver.

**534.** The right of pre-emption cannot under Hanafi texts, be waived conditionally or contingently on the happening of some future event. The authorities are divided whether a conditional or contingent waiver is operative absolutely (the condition or contingency being ineffectual).[17]

(C) Waiver on misinformation inoperative.

**535.** A waiver of the right of pre-emption based on misinformation [18] as to the amount or nature of the price, or the identity of the purchaser, does not, in so far as it is

[11] *Chunilal* v. *Sec. of St.*, (1910) 12 Bom. L. R. 769, 776.

[12] See s. 531, p. 694. Bail. I. 500 (par. 2) (506); II. 195 (par. 2); though some SHIA authorities express doubt as to WAIVER BY IMPLICATION.

[13] *Brajo Kishor Surma* v. *Kirti Chundra Surma*, (1871) 7 Beng. L. R. 19 = 16 W. R. 247.

[14] *Jehangeer Buksh* v. *Lalla Bikharee Lall*, (1868) 11 W. R. 480 = 7 Beng. L. R. 25 *n.*

[15] *Abadi Begam* v. *Inam Begam*, (1877) 1 All. 521 ; *Kanhai Lall* v. *Kalka Prasad*, (1905) 27 All. 670. Cf. *Shri Kishan Singh* v. *Bachcha Pande*, (1911) 33 All. 637.

[16] *Toral Komhar* v. *Auchhi*, (1872) 9 Beng. L. R. 253 = 18 W. R. 401 ; *Sheo Tuhul Singh* v. *Ram Kooer*, [1864] W. R. 311 ; *Kooldeep Singh* v. *Ram Deen S.*, (1875) 24 W. R. 198. Cf. *Indraj* v. *Clement*, [1915] 13 All. L. J. 288 (S offered to sell to P, who offered only Rs. 160, & refused to give more ; subsequently S sold for Rs. 235 ; held according to custom in village, vendor bound in first instance to offer property for sale to his co-sharers, therefore refusal of P to purchase must be considered to deprive him of his claim to pre-empt. See s. 535 *expl*.).

[17] Hed. 561 ; Bail. I. 502 (508); but see Bail. I. 500 (par. 3) (506); where it is said that it may be suspended on condition. The translator points out, Bail. I. 502 (508), *n.* 2, that condition referred to had already occurred in the first case, & was executory in latter.

[18] See Punjab Pre-emption Act & Oudh Laws Act referred to, s. 557, p. 726.

made in consequence of the said misinformation,[19] affect the right. SECTION 535.

*Explanation.*—The pre-emptor's refusal to purchase the land at a price which he believes, in good faith, to be fictitious and not real, is not a waiver, nor does it affect his rights ;[20] nor does the offer of the property by the seller to the pre-emptor before an agreement to sell it had been entered into.[21] But after the seller informs the pre-emptor of his desire to sell, and the pre-emptor declines to purchase on the ground that he has not the means, or any other similar ground, the seller may sell to a stranger.[22] Refusal to purchase the land.

*Illustrations.* P purports to waive his right of pre-emption on its being misrepresented to him,—(*a*) that the price was Rs. 1,000,—the real price being Rs. 500,—the right is not waived ; but if it was Rs. 2,000 or Rs. 999,—the waiver is valid ;[23] (*b*) that the purchaser was B,—if the real purchaser was BA, the waiver is invalid ;[24] (*c*) that the purchaser was B,—if the real purchasers were B and BA jointly, the waiver is valid as to B's share in it, but not as to BA's ;[25] (*d*) that the whole land had been sold,—only half of the land being really sold ; the right is extinguished under Hanafi law ; but not if the whole is sold and he is informed that only half is sold—[*sed quaere*,[23] see *ill.* (*f*)] ; (*e*) that the land was exchanged for one commodity,—and it was in fact exchanged for another commodity, the waiver is inoperative ;[23] (*f*) that 1/2 the land was sold for Rs. 100,—and in fact 1/4 was sold for 50, or vice versa,—pre-emption may be claimed ;[24] (*g*) that B and BA purchased it—and only B had in fact purchased it, or vice versa,—pre-emption may be claimed ;[24] (*h*) that A purchased it for himself,—and in fact he purchased it for B, or vice versa.—pre-emption may be claimed.[26]

IV. FORFEITURE OF RIGHT. (A) Release.

**536.** The right of pre-emption is forfeited if it is purported to be released for a consideration to be paid to the pre-emptor. Under Hanafi law, the pre-emptor cannot lawfully claim payment of the consideration for the release ;[26] but he may lawfully agree to take only part of the land for a part of the price,[27] proportionate or otherwise.

[19] Bail. I. 501 (par. 2) (507) ; II. 184.

[20] *Sri Kishan S.* v. *Bachcha Pande*, (1911) 33 All. 637.

[21] *Kanhai Lal* v. *Kalka Prasad*, (1905) 27 All. 670 (opportunity to buy must be given when definite agreement for sale at fixed rate entered into with stranger). Cf. *Indraj* v. *Clement*, [1915] 13 All. L. J. 288 = s. 533, *n.* 16.

[22] *Naunihal Singh* v. *Ram Ratan*, (1916) 39 All. 127.

[23] Bail. I. 501 (507) ; Hed. 562 (col. ii., par. 2) (563) ; *Minhaj*, 209 (Bk. 18, s. 2).

[24] Bail. II. 187-188 (*first, fourth*). [25] Bail. II. 187-188 (*first, fourth*).

[26] Hed. 561 ; Bail. I. 502 (508) ; II. 192 (*sixth*) : *semble* under Shia law payment of consideration may be enforced.

[27] E.g. he may take 1/2 land for 1/3 of price—Bail. I. 502 (*ll.* 18-22) (508)—

SECTION 537.

(B) Transfer of subjects of pre-emption

**537.** (1) The right of pre-emption is forfeited if the pre-emptor (before enforcing his right) purports to dispose of the subject of pre-emption to a stranger ;[28] but after a decree for pre-emption is obtained, the pre-emptor may sell or alienate its subject, though he has not executed the decree.[29]

(C) Partition.

(2) Where the right can be claimed only by co-parceners, it is extinguished on a partition being effected.[30]

A mortgage of the pre-emptor's own share or property prior to the sale, does not affect his right to pre-empt. But where the wajibu'l-arz gives not only in case of a sale, a right of pre-emption, but also a right to obtain a mortgage in priority to others, and if a co-sharer entitled to such prior right, in anticipation of exercising it himself, encumbers the share in question, he thereby forfeits his prior right.[31]

Sect. 536 refers to a release of the right to the seller ; s. 537 to what is in effect a transfer of it to an outsider.[32]

(D) Contract avoided or impossible of fulfilment.

**538.** Where the contract of sale is avoided, or it is impossible for the pre-emptor to carry it out, his right of pre-emption is extinguished.[1]

(E) Statutory forfeiture.

**538A.** The right of pre-emption may be forfeited by the pre-emptor being under some statutory disability as regards the purchase of the land in question.[2]

*Illustrations.*

The pre-emptor not being a member of the agricultural tribe within the meaning of the Bundelkhand Alienation Act, (Local Act II. of 1903), s. 3, there was no provision in the Act, entitling an intending purchaser to get the sanction of the Collector to bring a suit for pre-emption : *held* that the claimant could not be granted a decree for pre-emption ; that the Act provided that the property should not be sold to the pre-emptor, and absolved the seller from any customary obligation to first offer it to the pre-emptor.[2]

in which case he may be considered to release part of his right in consideration of part of purchase money.

[28] *Rajjo* v. *Lalman*, (1882) 5 All. 180 (object being to prevent intrusion of strangers, not to benefit co-sharers pecuniarily) ; cf. *Durga Prasad* v. *Munsi*, (1884) 6 All. 423, 425, 426 (*per* Mahmood, J.), p. 695, *n.* 20. See *Minhaj ut Talibin*, 209 (Bk. 18, s. 2) for Shafii law.

[29] *Ram Sahai* v. *Gaya*, (1884) 7 All. 107.

[30] *Muhammad Mahbub A. K.* v. *Raghubar*, (1915) 38 All. 27.

[31] *Rajjo* v. *Lalman*, (1882) 5 All. 180.

[32] Cf. *Sheo Narain* v. *Hira*, (1887) 7 All. 535 ; *Lachmi Narain* v. *Manog Dat*, (1885) 7 All. 291.

[1] Hed. 560 (col. i. par. 2) ; Bail. II. 179, (par. 2, inability to pay price), 196 (par. 2) ; e.g. where price cannot be determined, or the consideration has perished, transfer having been by exchange. Cf. Bail. II. 187, (par. 3) ; *Najmunnissa* v. *Ajaib Ali K.*, (1900) 22 All. 343 ; *Ojheeonissa B.* v. *Rustom Ali*, [1864] W. R. 219. Cf. *Busunt Koomaree* v. *Kali Persad S.*, (1862) Marsh. 11 = 1 Hay 32 (pre-emption upon re-sale, after first sale—with respect to which no claim made—has fallen through).

[2] *Suraj Bhan* v. *Somwarpuri*, (1915) 37 All. 662.

Where the mahal in respect of which there exists a custom of pre-emption comes into the ownership of a single individual, the effect has been held to be that the custom is put an end to and not merely in abeyance.[3]

SECTION 538A. Mahal being owned by a single individual.

**538B.** For the purposes of the Indian Limitation Act, s. 19, the buyer (*a*) is not the predecessor in title of the pre-emptor and (*b*) the buyer's acknowledgment in his written statement filed after a suit for pre-emption has been instituted does not bind the pre-emptor.[4]

V. LIMITATION.

## § 5.—THE SUBJECT OF PRE-EMPTION.

**539.** Aqar[5] or land[6] alone may validly be the subject of pre-emption ;[7] provided first, that where the subject of pre-emption consists of a share in a village or a large estate, neither a neighbour who is not a co-sharer,[8] nor a participator in appendages[9] can claim it on the ground merely of vicinage or such participation ;[10] and, secondly, that under

I. Subject of pre-emption : Land alone.

Neighbour : large estate.

[3] *Kamrunnissa B.* v. *Sughra B.*, (1917) 39 All. 480.

[4] *Shankar Lal* v. *Hashmi B.*, (1932) 54 All. 1023 (pre-emptor does not derive his title through buyer, but stands in his shoes in respect of rights & obligations arising out of sale : acknowledgment by buyer of existence of mortgage).

[5] Cf. Punjab Pre-emption Act, s. 71 & Oudh Laws Act, s. 7 : see s. 557, p. 726.

[6] E.g. AGRICULTURAL ESTATE : (*Shaikh*) *Karim Buksh* v. *Kamrudeen Ahmed*, (1874) 6 N. W. 377 ; *Fazal Ahmad* v. *Tasadduq Husain*, (1919) 41 All. 428 (ZAMINDARI property) ; *Ilahi Jan* v. *Mohammad Ishaq K.*, [1919] 17 All. L. J. 687 (ZAMINDARI ESTATE : where right based on contract & contract has come to an end,—pre-emption may be claimed under Muhammadan law) ; (*Sheikh*) *Kadir Bux* v. *Ram Tahul Bhagut*, (1871) 3 N. W. 125 (claim for pre-emption under Act I. of 1841, s. 2, sustainable in respect of imperfect PUTTADARI TENURE) ; *Kesho Rai* v. *Binayak Rai*, (1868) 3 Agra 179 (pre-emption allowed in respect of a KOTEE & GOLAH as proved that under local CUSTOM such properties were subject to pre-emption). For Shafii law see *Minhaj*, 205, (Bk. 18, s. 1).

[7] Bail. I. 472 ; 473 (par. 4) ; 474 ; II. 175. See comm. *Sharaiu'l-Islam*, *Minhaj-ut-Talibin* cited therein.

[8] CO-SHARER in any land, large or small may pre-empt : *Jehangeer Buksh* v. *Bhickaree Lall*, (1869) 11 W. R. 71 = 6 Beng. L. R. 42, *n.* s. c. affirmed on review, *Re Petition of Jehangeer Baksh*, (1870) 7 Beng. L. R. 24 = 11 W. R. 480 ; *Mahatab Singh* v. *Ramtahal Misser*, (1869) Beng. L. R. 43 *n.* = 10 W. R. 314 ; *Saiduddin* v. *Latifunnissa*, (1921) 44 All. 115 (basis of pre-emption by SHARIKS (CO-SHARERS) in zamindari property is common liability to pay Govt. reven. : whether or not one pre-emptor's own share is within same sub-division of imperfectly partitioned *mahal* as share sold).

[9] E.g. (*Shaik*) *Karim Buksh* v. *Kamruddeen Ahmed*, (1874) 6 N. W. 377.

[10] *Munna Lal* v. *Hajira Jan*, (1910) 33 All. 28 (cases collated) ; *Re Petition of Chatternath Jha*, alias *Jhinga Jha*, (*Sheikh*) (*Shah*) *Mahomed Hossein* v. *Mohsin* (*Shah Mohsun*) *Ali*, (1870) 6 Beng. L. R. 41 = 14 W. R. (F. B.) 1 (*per* Couch, C. J., Mitter, J., authorities collated : in LARGER ESTATES or in VILLAGES, partner has right of pre-emption : not neighbour : pre-emption on ground of vicinity confined to property of small extent) ; *Ejnash Fooer* v. *Amjud Ally*, (1868) 2 W. R. 261 ; *Chowdry Joogul K. S.* v. *Poocha S.*, (1867) 8 W. R. 413 ; *Abdul Azim* v. *Khondhar Hamed Ali*, (1868) 2 Beng. L. R. (A. C.) 63 = 10 W. R. 356 ; *Abdul Rahim* v. *Kharag S.*, (1892) 15 All. 104 ; (*Sheikh*) *Mahomed Hossein* v. (*Sheikh*) *Mohsun Ali*, (1870) 14 W. R. 266 ; (*Sheikh*) *Karim B.* v. *Kamruddeen Ahmad*, (1874) 6 N. W. 377. Shia law does not give NEIGHBOURS right of pre-emption in any case ; s. 541(3).

SECTION 539. **Shafii law property which is incapable of division cannot be subject of pre-emption.**[11]

*Illustrations.* (1) Movables cannot validly be the subject of pre-emption,[12] but trees[13] or buildings when transferred with the land on which they stand, or a dwelling house sold for occupation, without the ownership of the site,[14] may be the subject of pre-emption.

(2) A claim to mesne profits due before the date on which the right to pre-emption arose, cannot form the subject of pre-emption.[15]

1.—Meaning of aqar. "The strict meaning of the word aqar is space covered with buildings, so that, properly speaking, the term is not applicable to zaiat.[16] But according to the Kifayah, and the Inayah, aqar in the sense in which it is liable to pre-emption includes a zaiat.[17]

"The Prophet has said that there is no shufa except in a ruba or mansion, and a hait or garden.[18]

2.—Of hait. "Hait means properly a wall or that which surrounds, though applied elliptically to the enclosure (Freytag) ... It would seem that the right of shufa is, strictly speaking, applicable only to houses and small enclosures of land. It has been held, however, to extend to a whole mauza or village."[19]

3.—Shafii law. (Movables). It is stated in the Minhaj-ut-Talibin, (Shafii text): "This right does not exist in reference to movable property, but only with regard to land and what is naturally included in it, like buildings and trees, and fruit not artificially fertilized. There is no right of pre-emption in the case of a hujra (room) supported on a roof, even a roof held in common; nor in the case of any thing that cannot be divided without lowering the value, such as a hall or a mill."[20]

4.—Shia law. Doubt as to pre-emption in regard to movables, &c. The Sharaiu'l-Islam (Shia text) mentions that (1) some authorities hold that to obviate the inconvenience of divisions, pre-emption may be claimed in regard to movables, such as wearing apparel, household utensils, shipping, animals and the like; (2) doubt is expressed regarding rivulets, ways, baths, and other property, the division of which would occasion loss or

11 Hed. 555 (col. ii. par. 1). See com.

12 Bail. I. 475 (par. 3) (479); II. 176 (par. 1).

13 *Minhaj* (Shafii text) adds "& FRUIT not artificially fertilized;" but contrary held by authorities of repute.

14 *Zahur* v. *Nur Ali*, (1879) 2 Al.. 99.

15 *Emamooddeen Sowdagar* v. *Abdool Soobhan*, (1866) 7 W. R. 117.

16 Spelt *zuyut* by Bail. I. 472 (476 *n.* 2). According to Freytag *zaiat* is a field whether arable or pastoral. *Fatawa Alamgiri* III. 605 last 2 *ll.* citing *Kifayah* IV. 940 & *Inayah* IV. 263. Richardson: "An estate, productive farm, villa, any immovable possession. Land & water." *Alfaraidu'd-Durriya*: "Village, funded property, estate."

17 Bail. I. 472 (476) *n.* 2. *Ram Chand Khanna* v. *Goswami Ram Puri*, (1923) 45 All. 501 (CUSTOM OF PRE-EMPTION relating to land will not be presumed though custom of pre-emption relating to houses is admitted: former custom must be strictly proved).

18 *Hidayah* & *Kifayah* IV. 940.

19 Bail. I. 474 (478) *n.* 1, citing 3 Cal. S. D. A. 85.

20 *Minhaj* 205 (Bk. 18, s. 1) opening lines of Bk. on pre-emption.

damage ; and (3) as to apparatus of a well, such as wheels and buckets made use of in drawing water, which, though strictly movable, are by custom never removed from the well. But the correct opinion is stated to be that pre-emption is restricted to lands.[21] SECTION 539.

5.—Sale of house apart from site.

The sale of a house, apart from the site on which it stands, has been held (*a*) to be subject to pre-emption where the buyer means to occupy it, and does not intend to remove the building as old materials ;[22] but (*b*) that the owner of the land on which it stands is not entitled to pre-empt, "where his property in the land is wholly separate and distinct from the property in the house, which belongs to another person, with whom the owner has nothing in common."[23] (i) It appears from the reports that in the decision of 1879 the pre-emptor claimed as a neighbour,[22] but (ii) it does not appear how his vicinage arose—whether he was the owner of adjoining land (or house) or of the site on which the house sold was standing ; nor (iii) whether the claimant in 1870 omitted to claim as a co-sharer or neighbour[23] or (iv) was held not to be even a neighbour.[24] The pre-emptor in 1870 may have been a Shia, and then there would be no difficulty in understanding it.

(A) Whole land sold must be pre-empted.

*Exceptions.*

**540.** Pre-emption[1] must be claimed in respect of the whole of the property sold,[2] notwithstanding that the claimant is one of several joint pre-emptors,[3] provided that (1) a pre-emptor whose right of pre-emption extends to or affects a part only of the subject of sale,[4] may on payment of a proportionate[5] part of the consideration for sale,[6] claim to pre-empt such part alone ;[7] (2) where the buyer and the

[21] Bail. II. 175-177.

[22] *Zahur* v. *Nur Ali*, (1879) 2 All. 99.

[23] *Pershadi Lal* v. *Isshad Ali*, (1870) 2 N. W. 100.

[24] Cf. OWNERS OF UPPER & LOWER STORIES of house held to be neighbours & no more : s. 545, *ill.* (7) = *Ganeshi Lall* v. *Luchman Dass*, (1873) 5 N. W. 31.

[1] See s. 530 A, p. 693.

[2] See s. 529, p. 691. *Sheobharos Rai* v. *Jiach Rai*, (1886) 8 All. 462 (*per* Mahmood, J.). See com. & s. 527, pp. 681 ff. Where property described in plaint by error to be of less area than it is in reality, plaint may be amended by leave of Court : *Barkat Unnesa* v. *Muhammad Asad Ali*, (1895) 17 All. 288.

[3] Bail. I. 482 (*ll.* 15-22) (488), 492 (par. 2) ((499) ; II. 182 (par. 2). *Durga Prasad* v. *Munsi*, (1884) 6 All. 423 : *Cazee Ali* v. *Musseeutoollah*, (1882) 2 W. R. 285. Cf. *Hulasi* v. *Sheo Prasad*, (1865) 6 All. 455 ; *Arjun Singh* v. *Sarfaraz Singh*, (1888) 10 All. 182. *Abdul Khan* v. *Shakira B.*, (1927) 50 All. 348 (here claim arose partly under special Act & partly under general law : as demands not made, claim under general law failed : consequently other part of claim also dismissed = s. 540, *ill.* (1), p. 704) : but see *Amjad Khan* v. *Saadat B.*, (1931) 53 All. 524.

[4] *Saligram* v. *Debi Pershad*, (1874) 7 N. W. 38 (shares in two tenements sold, & pre-emptor co-sharer in only one of them). Cf, if buyer himself entitled to pre-empt as against pre-emptor, rights of plaintiff being of no higher degree : see s. 527, pp. 681 ff : e.g. if buyer is one of co-sharers of seller 3rd co-parcener may claim to pre-empt 1/2 land : *Amir Hasan* v. *Rahim Bakhsh*, (1897) 19 All. 466 ; *Abdullah* v. *Amanatullah*, (1899) 21 All. 292.

[5] *Saligram* v. *Debi Pershad*, (1874) 7 N. W. 38 (several parts of land varying in price, may have to be separately valued).

[6] Cf. *Muhammad Latif* v. *Govind Singh*, (1883) 5 All. 382.

[7] Bail. I. 492 (par. 1) (498) ; II. 177 (par. 3), 183 (par. 2) ; *Abdullah* v.

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pre-emptor are in respect of pre-emption equal in degree,[8] the pre-emptor need not claim that part of the land which would not be allotted to him because[9] of the equal rights of the buyer,[9] under s. 527. The buyer has no option to rescind the sale of that part which is not pre-empted.[9]

(B) Sale of several distinct properties.

*Explanation.*—Where two or more distinct properties are sold by the same contract, one or more of them may be pre-empted without the other, notwithstanding that the pre-emptor is the same in respect of each of them.[10] Where the property is purchased by several co-purchasers the pre-emptor may pre-empt the share of one co-purchaser alone by making a demand solely to him.[11]

*Illustrations.*

(1) S sells land, over which P and PA have rights of pre-emption, and (P being absent) PA asserts his claim to half the land by pre-emption; or (both being present,) they each assert a claim to half of it. In both cases the assertion of the claim is void.[12] On similar grounds, pre-emption was not allowed to be claimed as to part of land under the AGRA PRE-EMPTION ACT (local) XI. of 1922, and as to the rest, under Muhammadan law;[13] but that decision was subsequently distinguished and corrected, and it was held that a statutory right cannot be taken away by common law outside the Act, and while the claim was dismissed so far as it was under general law, it was allowed in so far as it was under the Act.[14]

(2) S sells several houses in a street where there is no thoroughfare, and P desires to pre-empt one of them; if P's claim of pre-emption is based on partnership in the way, he cannot take a part of the property sold, for this would be to divide the bargain without any necessity: but if his claim be based on neighbourhood, and he is neighbour only to the house which he wishes to take, he may lawfully take it alone.[15]

(3) A, as the agent of B and BA, purchases plots of land from S and SA

*Amanatullah*, (1899) 21 All. 292; *Rowshun Koer* v. *Ram Dihal Roy*, (1883) 13 Cal. L. R. 45.

[8] I.e. co-sharers or *khalits* or neighbours, as the case may be. See s. 527, pp. 681 ff.

[9] The buyer cannot rescind the sale because the claim of *shufa* supervenes on what is his own property: Bail. II. 183 (par. 13). See s. 540, *ill.* (5).

[10] Bail. II. 187 (par. 2); *Izzatulla* v. *Bhikari Molla*, (1870) 6 Beng. L. R. 386 = 14 W. R. 469; *Raghunandan Singh* v. *Majbuth Singh*, (1868) 10 W. R. 379 = 6 Beng. L. R. 387, *n.*; *Mt. Sarwari B.* v. (*Mt.*) *Razia K.*, [1929] AIR (ALL.) 156 = 27 All. L. J. 187 (plaint may claim pre-emption of some items omitting others for which also demand made).

[11] *Muhammad Askari* v. *Rahmatullah*, [1927] 25 All. L. J. 473.

[12] Bail. I. 482 (par. 1) (488).

[13] *Abdul Khan* v. *Shakira B.*, (1927) 50 All. 348.

[14] *Amjad A. K.* v. *Saadat B.*, (1931) 53 All. 524; *Zainab B.* v. *Umar Hayat K.*, (1936) 58 All. 873, 879 (Act amended: claim under Act need not include properties which may be pre-empted under custom or other law: 58 All. at 880).

[15] Bail. I. 492 (par. 1) (498).

respectively ; P having the right to pre-empt both cannot pre-empt one of the plots without the other.[15] SECTION 540.

(4) A and AA are both agents of B, and purchase plots of land from S. P may pre-empt either plot without the other.[16]

(5) S purported to sell his own share, and that of SA, a minor, in certain property to B, and covenanted to compensate B if SA did not, on coming of age, ratify the sale. P then sued for pre-emption. The trial Court dismissed the suit. The lower appellate court held that P could not enforce her claim in respect of SA's share : at its suggestion the plaint was amended so as to refer only to S's share. *Held*, that P was bound to claim her right against all the shares, and could not enforce it in respect of some only,—" having thought fit to enforce her claim only as regards the shares which are safe, this withdrawal entirely invalidated the whole claim." [17]

(6) P having a right to pre-empt the whole subject of sale consisting of (i) a share in a village, and (ii) a plot of land in a city, omits to make a prompt assertion of his claim. *Held*, that he cannot pre-empt even share (i), notwithstanding that he is willing to pay for it the total price agreed to be paid for both (i), and (ii), and to leave (ii) (as to which his right to pre-empt is not established) in the buyer's hands.[18]

" The principle or ratio decidendi of denying the right of pre-emption except as to the whole of the property sold," explained Mahmood, J.,[19] " is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property, and leave the worst part of it with the vendee." [19] But where " the shares are separately specified, and the sale to the stranger is distinctly divisible, the reason for the rule does not exist. The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated ; and the rule should be so limited, for it would be a very great hardship, if the vendee by the association of a stranger in respect of a small but specified portion of the property purchased, should have to forfeit his entire right of purchase in favour of a sharer having equal but not preferential rights. Indeed, where the share of each purchaser and the price which he had paid for it are distinctly specified in the sale deed, there is really no breaking up of the bargain, as understood in the law of pre-emption, if the purchaser is ousted from the specific share which he has individually purchased along with others under the same deed of sale. Moreover, even under the strict rule of pre-emption, the pre-emptor, in dealing with a sale under which more persons than one have purchased, is entitled to say that he

1.—Reason : pre-emptor cannot pick out best part of bargain.

2.—Limitations to the rule.

[15] Bail. I. 493 (par. 1 ; *ll.* 4, 5, of par. 2) (499). But see s. 540 *expln. n. & ill.* (4).

[17] *Abdool Guffoor* v. (*Mt.*) *Noor Banoo*, 10 W. R. 111 = 1 Beng. L. R. (A. C.) 87 (Court " could not shut eyes to fact that withdrawal of part of claim not spontaneous, but suggested by expressed opinion of judge " : " plaintiff yielding to influence which she thought she could not resist " : " but we are not at liberty to give effect to mere surmise " : suit dismissed : parties bearing their own costs).

[18] *Muhammad Wilayat A. K.* v. *Abdul Rab*, (1811) 11 All. 101, followed *Mujib Ullah* v. *Umed Bibi*, (1898) 21 All. 119.

[19] *Sheobharos Rai* v. *Jiach Rai*, (1886) 8 All. 462, 466.

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objects to the intrusion of only one of the purchasers, and wishes to exclude him, pre-empting the specific share which such purchaser has individually acquired." [19]

3.—Distinction between joint sellers and joint purchasers.

Abu Hanifa held that the right to pre-empt any portion of the subject of the sale attracts the option of pre-empting the whole; but Imam Muhammad and the Shia authorities [20] and the decisions in India hold otherwise.[21] Hanafi texts state [22] (*a*) that where several sellers jointly sell the land to one purchaser, the right of pre-emption can only be exercised as to the whole of the land sold; but (*b*) when several purchasers buy land from one seller, the portion of land agreed to be sold to each seller, may by itself form the subject of pre-emption. The reason assigned being that in case (*a*) it would "occasion a discrimination in the bargain to the purchaser, and be productive of very great inconvenience to him, whereas in the case (*b*) the shafee being merely the substitute of one of the (five) purchasers, no discrimination in the bargain is occasioned." [23]

## § 6.—THE PRE-EMPTOR.

1. PERSONS ENTITLED TO PRE-EMPT.

**541.** (1) Under Hanafi law[1] pre-emption may (subject to s. 539, as regards shares in villages and large estates) be claimed by the sharik (or co-sharer), the khalit (or participator in appendages) and by the jar, (or neighbour) as defined respectively in ss. 541 A to 541 C,[2] and by no others.[3]

Shafii law: co-sharers alone.

(2) Under Shafii law pre-emption may be claimed only by co-sharers, and not by participators in appendages, nor by neighbours.[4]

Shia law: Two co-sharers.

(3) Under Shia law, pre-emption may be claimed only where two persons are co-sharers in undivided property, and one of them sells his share: it cannot be claimed by any others than co-sharers,[5] nor if there are more co-sharers than two.[6]

[19] Bail. I. 493 (par. 2) (499); Bail. II. 177 (par. 3); Abu Hanifa also seems to have held same opinion at one time.

[21] *Surdharee Lall* v. *Laboo Moodee*, (1876) 25 W. R. 499, 500.

[22] Bail. I. 492 (498); Hed. 564.

[23] Hed. 564. Reason in Bail. I. 592 (498) for rule (*b*): "bargain has been separate from the beginning."

[1] Cf. Punjab Pre-emption Act, 1913: referred to in detail s. 557 below, pp. 726-728.

[2] Hed. 548; Bail. I. 473-474 (477-478).

[3] Cf. *Pershadi Lal* v. (*Syud*) *Irshad*, (1870) 2 N. W. 100; *Mathura Prasad* v. *Hardev Bakhsh S.*, (1920) 42 All. 477 (no right between OWNERS OF DIFFERENT PARTS of *mahal* divided by imperfect partition); (*Mt.*) *Bibi Saleha* v. *Haji Amiruddin*, (1928) 8 Pat. 251 (*muqarraridar*, holding under CO-SHARER, has no right to pre-empt as against another co-sharer. On MUQARRARIDAR see *Kally Dass Akiri* v. *Monmohini Dassee*, (1897) 24 Cal. 440, 447). See s. 539, s. 701 as to LARGE ESTATES.

[4] *Minhaj*, 205 (Bk. 18, s. 1); Hed. 548, 549.

[5] Syed Saheb Ameer Ali says that a *khalit* has right of pre-emption under Shia law, but does not cite any authority, *Mah. Law*, I. 616 (737).

[6] Bail. II. 179; *Abbas Ali* v. *Maya Ram*, (1888) 12 All. 229 (neighbours have no right); *Saiyed Muhammad Raziuddin* v. *Raghubir Prasad*, [1918] 16 All. L. J.

(4) Rights of pre-emption arising under special enactments must be determined by construing them.[7] SECTION 541.

Sect. 541 to 541 H (pp. 706-710) must be read together. They all formed part of a single section in the first edition of this work. The illustrations to all of them will be found after s. 541 H, pp. 711 ff. The relative priorities of pre-emptors are stated in s. 545, p. 714.

**541 A.**[8] By the sharik or co-sharer,[9] is meant the owner[10] of an undivided[11] share in that property[12] of which the subject of pre-emption forms a part or share.[13] This definition is subject to ss. 541 D—541 H.[14] (A) Co-sharer of seller.

For the purposes of ss. 541A and 545, it has sometimes to be decided whether two pieces of land form separate estates, or are owned by co-sharers: partition extinguishes the relation of co-sharers, and may, therefore, extinguish the right of pre-emption, where the right inheres only in co-sharers. (i) Properties bearing separate numbers in the Collector's rent-roll have been held to be separate estates, implying a bar to pre-emption arising from co-parcenary;[14] and (ii) where, at a settlement of a village constituting a single mahal, a record of rights was framed, giving certain pre-emptive right to the co-sharers in the village, but subsequently the village was divided by perfect Owners of adjoining land.

507 (no right where there are more co-sharers than 2); *Husain Baksh* v. *Mahfuz-ul-Huq*, (1925) 47 All. 944, 947 (authorities collected: under Shia law no pre-emption where the properties concerned were never jointly owned, but merely connected by there being a COMMON PIECE OF LAND over which each house has right of way). Some doubt whether, where there are more joint owners of land than two, they have no right; (*Sheikh*) *Daim* v. (*Mt.*) *Asooha B.*, (1870) 2 N. W. 360 (claim allowed: arguing that Shia authorities doubtful & practice of Court being not to defeat a claim on this ground, see p. 79, *n.* 11). See also *Tafazzal Husain* v. *Hadi Hasan*, (1879) 6 All. W. N. 139. Both these decisions were dissented from in *Abbas Ali's* case, 12 All. 229.

[7] E.g. *Raja Birendra Bikram S.* v. *Brij Mohan Pande*, (1934) 61 I. A. 235 (OU.) (Oudh Laws Act, 1876: TALUKDARI MAHAL of several villages: under-proprietor may not pre-empt superior rights in village).

[8] Sect. 541-A cited & applied: *Mathura Parsad* v. *Hardeo Bakhsh S.*, (1920) 44 All. 477, 479.

[9] *Nand Lal* v. *Bansi*, (1898) 20 All. 19 (mortgagee of co-sharer is not co-sharer); *Muhammad Ali* v. *Hukam Kunwar*, (1905) 28 All. 246 (person who buys plot of groveland in village does not thereby become co-sharer in village, so as to entitle him to enforce pre-emption under *wajibu'l-arz* conferring such right upon co-sharers). See also *Kaleshar Rai* v. *Nabiban Bibi*, (1906) 28 All. 642; *Ali Husain Khan* v. *Tasadduq Husain Khan*, (1905) 28 All. 124.

[10] *Lekhraj* v. *Gurda*, (1904) 26 All. 212 (MANAGER OF HINDU TEMPLE, holding as such manager zamindari property on behalf of temple, considered owner for purposes of s. 541); *Padam S.* v. *Umrao S.*, [1923] 21 All. L. J. 527 (MORTGAGEE not entitled to pre-empt against co-sharers).

[11] See s. 541 H, *ill.* (5). *Aziz Ahmad* v. *Nazir Ahmad*, (1927) 50 All. 257 (owners of undivided shares in plot of land, divided by *kachcha* road, over which public have right of passage, are SHARERS).

[12] *Akhoy Ram Shahajee* v. *Ram Kant Roy*, (1871) 15 W. R. 223 (share in zamindari).

[13] *Nundo Pershad Thakur* v. *Gopal Thakur*, (1884) 10 Cal. 1008 (under Hanafi & Shafii law pre-emption may be claimed by one or more of PLURALITY OF CO-SHARERS).

[14] *Joobraj Singh* v. *Tookun Singh*, (1870) 14 W. R. 476.

SECTION 541A. partition into three separate mahals, the co-sharers in any one mahal were held to have no claim to pre-emption in respect of land situated in another mahal.[15] See *ill.* ss. 541 H, 545, pp. 711, 714.

(B) Participator in appendages.

**541 B.** By the khalit or participator in appendages,[16] is meant the owner[17] of property to which is annexed or on which is imposed a private[18] right of way or of water[19] [or other easement or appendage][20] such right being also annexed to, or imposed upon, the subject of pre-emption.[21] This definition is subject to ss. 541 D, 541 F and 541 G.

See s. 541 H, *ill.* pp. 711 f. Khalit literally means "mixed up." Baillie says that though rights of water and way are given as examples, it does not appear that a khalit in any other right than these, has the right of pre-emption.[22] See s. 545, com., p. 716.

(C) Neighbour.

**541 C.** By the jar or neighbour,[23] is meant the owner[17] of property adjoining the subject of pre-emption.

See *ill.* ss. 541 H, 545, pp. 710, 715 f.

II. TITLE OF PRE-EMPTOR.

(1) Expectancy or contingent right gives no title.

**541 D.** (1) The pre-emptor must, at the time of the sale,[24] and until the institution of a suit to enforce pre-emption,[25] and, *semble*, also until the decree[26] for pre-emption is passed[27] by the trial Court,[28] have the status by virtue of which he claims

[15] *Ghure* v. *Man Singh*, (1895) 17 All. 226; *Ram Gopal* v. *Piari Lal*, (1899) 21 All. 441. See also *Abdul Hai* v. *Nain Singh*, (1897) 20 All. 92; *Janki Prasad* v. *Ishar Das*, (1899) 21 All. 374; *Shiam Sundar* v. *Amanat B.*, (1887) 9 All. 234 (even after partition original *wazibu'l-arz* binding until new one shown to be made).

[16] (*Shaikh*) *Karim B.* v. *Kamruddeen Ahmad*, (1874) 6 N. W. 377. CONTRA *Karim* v. *Priyo Lal B.* (1905) 28 All. 127.

[17] *Lekhraj* v. *Gurda*, (1904) 26 All. 212 (manager of temple).

[18] Not thoroughfares, *Karim Baksh* v. *Khuda Baksh*, (1894) 16 All. 240.

[19] *Rokaiya Begam* v. *Ahmadi Khanum*, (1912) 9 All. L. J. 769.

[20] *Aziz Ahmad* v. *Nazir Ahmad*, (1927) 50 All. 257 (branches of TREE PROJECTING over land of neighbour does not give owner of tree any right as *shafi khalit*).

[21] Hed. 548; Bail. I. 473-474 (477-478).

[22] Bail. I. 476 (481).

[23] See s. 539 (as to large estates).

[24] See s. 541 H, *ill.* (7), p. 712, so his having mortgaged it on previous occasion does not affect his right: *Ujagar Lal* v. *Jai Lal*, (1896) 18 All. 382; *Gokul Chand* v. *Ram Prasad*, 9 All. W. N. 127; s. 541 D(2).

[25] *Janki Prasad* v. *Ishar Dass*, (1899) 21 All. 274; *Muhammad Mahbub A. K.*, v. *Raghubar*, (1915) 38 All. 27; *Ram Hit S.* v. *Narain Rai*, (1904) 26 All. 389; *Ram Gopal* v. *Piari Lal*, (1899) 21 All. 441; *Rohan Singh* v. *Bhau Lal*, (1909) 31 All. 531 (right as at institution of suit, & not as at time of decree); *Kaleshwar Rai* v. *Nabiban B.*, (1906) 28 All. 642.

[26] *Ram Gopal* v. *Piari Lal*, (1899) 21 All. 441; *Sanwal Das* v. *Gur Prasad*, (1908) 10 Punj. L. R. 561 (F.B.) [over-ruling *Faiz Baksh* v. *Ramji Das*, [1875] Punj. Rec. 34]; followed: *Nuri Mian* v. *Ambica S.*, (1916) 44 Cal. 47, 58, *l.* 22; but see s. 541 H, *ill.* (7), p. 712 & *Narain Singh* v. *Parbat S.*, (1901) 23 All. 247.

[27] Not necessarily at execution of decree for pre-emption: *Ram Sahai* v. *Gaya*, (1884) 7 All. 107.

[28] *Nuri Mian* v. *Ambica Singh*, (1916) 44 Cal. 47, 55 ff. 58 *l.* 22.

pre-emption, viz. the status of co-sharer or participator or neighbour as the case may be. SECTION 541D.

(2) The right of pre-emption does not arise in favour of a mere expectant heir,[30] or from holding a reversionary, or any kind of contingent right or interest, falling short of full ownership.[30]

(3) Possession [31] is neither necessary [32] nor a substitute for the status by reason of which pre-emption is claimed ;[33] nor is such status affected by the share or property being mortgaged.[34]

(4) Where the buyer and the pre-emptor are equal in degree (s. 522) their claims of pre-emption in respect of the original sale are governed by ss. 527, 540.

Loss of right after suit brought.

Ought the Courts to insist on the claimant for pre-emption being entitled to claim it up to the time that the decree for pre-emption is passed, or is it enough if the right inheres in him at the time of the institution of the suit? That it must inhere in the plaintiff until the decree of the trial Court is passed, has been held in several decisions. This may involve the necessity for events after the institution of the suit being taken into account. The texts on pre-emption have been considered,[28] together with the cases in which it is incumbent upon a Court of justice to take notice of events that have happened since the institution of the suit, and to mould its decree according to the circumstances as they stand at the time the decree is made.[35] See s. 541 H, *ill.*

Events after suit instituted.

**541 E.** The purchaser by acquiring the status of a co-sharer pendente lite, (it has been held) does not deprive the plaintiff of his right to pre-empt.[1]

(2) Purchaser getting right of pre-emption pendente lite.

[29] So that by selling property (or his share in it), he loses his right : Hed. 562 (col. i. par. 3) : *Janki Prasad* v. *Ishar Dass*, (1899) 21 All. 274. But see s. 541 H.

[30] Hed. 562 : *Sakino Bibi* v. *Amiran*, (1888) 10 All. 472 (*per* Mahmood, J.). See ss. 541, 541H, *ill.* (8).

[31] E.g. TENANT cannot pre-empt : *Gooman S.* v. *Tripool S.*, (1867) 8 W. R. 437. Cf. *Bhajan* v. *Mushtak Ahmad*, (1883) 5 All. 324 (S sells his property to B in 1870, on condition that S has option to repurchase it at any time during 13 years : B deemed to be owner of property & not S, until option exercised).

[32] See s. 541H.

[33] *Beharee Ram* v. *Shoobhudra*, (1868) 9 W. R. 455.

[34] *Ujgar Lal* v. *Jai Lal*, (1896) 18 All. 382 ; *Gokul Chand* v. *Ram Prasad*, 9 All. W. N. 129 ; *Ali Ahmad* v. *Rahmat Ullah*, (1892) 14 All. 195.

[35] *Nuri M.* v. *Ambica S.*, (1916) 44 Cal. 47, 55, 58. Citing *Rai Charan Mandal* v. *Biswa Nath M.*, (1914) 20 Cal. L. J. 107 (cases collected).

[1] *Rohan S.* v. *Bhau Lal*, (1909) 31 All. 530 ; cf. *Kaleshar Rai* v. *Nabiban B.*, (1906) 28 All. 642 ; *Ram Hit S.* v. *Narain Rai*, (1904) 26 All. 380 (it seems to have been overlooked that s. 527, p. 681, became applicable) ; *Nadir Husain* v. *Sadiq Husain*, (1924) 47 All. 324 (purchaser & pre-emptor may become equal in degree & s. 527 will in that event operate).

[2] *Beni Shanker Shelhat* v. *Mahpal Bahadur Singh*, (1887) 9 All. 480 ; cf. *Gunga Ram* v. *Moola*, (1870) 2 N. W. 200.

SECTION 541F.

(3) Benami purchaser or presumptive heir not co-sharer.

**541 F.** (1) Neither a secret benami purchaser of a share in the land,[2] nor the presumptive heir of a living Muslim as defined in s. 285 (11), is deemed a co-sharer for the purposes of ss. 541, 541 A and 541 D.[3]

(2) Pre-emption under the Oudh Laws Act, 1876, is not claimable by a person denying the title of the seller, alleging that the seller is not co-sharer with himself, and claiming to be himself solely entitled to the whole of the property.[4]

(4) Khalit is not necessarily owner of heritage dominant or servient to land.

**541 G.** If the owner of the subject of pre-emption and the claimant participate in the beneficial enjoyment of a private right of way or water [or other appendage, or easement : see s. 541 B] each becomes the khalit of the other,[5] though the properties owned by them may not be mutually dominant and servient heritages ;[6] where the appendage consists of an easement, it need not have become absolute[7] by having been peaceably enjoyed during the period of prescription.[8]

(5) Effect of partition.

**541 H.**[9] On a complete[10] partition, the community of interest ceases for the purpose of ss. 541 and 541 A ;[11] and it does not subsist where an inconsiderable part of the estate

[2] *Fida Ali* v. *Muzaffer Ali*, (1882) 5 All. 65 ; cf. s. 526, com.

[4] *Abdul Wahid K.* v. *Shaluka Bibi*, (1893) 21 I. A. 26 = 21 Cal. 496 ; OUDH LAWS ACT recognizes right of pre-emption in (i) co-sharers in sub-division, (ii) co-sharers of whole mahal, (iii) members of the village community, (iv) proprietor, —where the property is an under proprietary tenure, pp. 726 f, p. 727, *n.* 21.

[5] (*Sheik*) *Karim Baksh* v. *Kamruddeen Ahmad*, (1874) 6 N. W. 377 (COMMON APPURTENANCE in shape of undivided plot of land, some trees & tanks attached); *Maktab Singh* v. *Ramtahal Misser*, (1868) 10 W. R. 314 = 6 Beng. L. R. (F. B.) 43 *n.* (FISHING RIGHTS).

[6] *Ranchhoddass* v. *Jugaldas*, (1898) 24 Bom. 414 (subject of pre-emption was SERVIENT HERITAGE ; RIGHT OF WAY); *Chand Khan* v. *Naimat Khan*, (1869) 3 Beng. L. R. (A. C.) 296 = 12 W. R. 162 (it was DOMINANT HERITAGE : IRRIGATION).

[7] *Baldeo* v. *Badri Nath*, (1909) 31 All. 519. [8] Cf. Ind. Easemts. Act, s. 15.

[9] Sect. 541 H = s. 541, *ill.* (6) in first ed. See s. 541 D ; *Janki Prasad* v. *Ishar Das*, (1899) 21 All. 374 ; *Dalganjan S.* v. *Kalka S.*, (1899) 22 All. 1 (F. B.).

[10] Not an IMPERFECT PARTITION : *Muhammad Usman* v. *Muhammad Abdul Ghafur*, (1911) 34 All. 1 ; *Mathura Prasad* v. *Hardeo Bakhsh*, (1920) 44 All. 477 ; *Saiduddin* v. *Latifunnissa B.*, (1921) 44 All. 114.

[11] *Munnu Lal* v. *Hajira Jan*, (1910) 33 All. 28 = s. 542 H, *ill.* (9); *Digambar* v. *Ram Lal*, (1887) 14 Cal. 761 ; *Brij Nath S.* v. *Dooly Mahtoon*, (1869) 11 W. R. 215 ; *Mohadeo S.* v. (*Mt.*) *Zeenutoonissa*, (1869) 11 W. R. 169 = *Mahadeo* v. *Ziatannissa*, 7 Beng. L. R. 45 *n.* = s. 545, *ill.* (4); (*Chowdhry*) *Joogul Kishore* v. *Poocha S.*, (1867) 8 W. R. 413 (separate AGREEMENTS with zamindar by co-sharers in taluqa TO PAY RENT, each being liable for his own share of rent only, subject to which arrangement lands continue *ijmali* : right of pre-emption not affected). *Wajibu'l-arz* : presumption that after PARTITION, no claim : *Dalganjan S.* v. *Kalka S.*, (1899) 22 All. 1, 30 (F. B.); *Ganga S.* v. *Chidi Lal*, (1911) 33 All. 605 ; *Mahadeo* v. *Jagar*, (1916) 38 All. 260. P. C. in *Digambar* v. *Ahmad*, (1914) 42 I. A. 10 (ALL.) (P. C. not prepared to dissent from Bannerji, J.'s statement that where "fresh *wajibu'l-arz* has not been prepared, it does not follow as matter of law or principle that the custom or contract in force before partition, is no longer to have effect or operation").

is left undivided by oversight ; but where an integral portion of the property, as a wall, is purposely left joint and undivided, the community of interest subsists.[12] SECTION 541H.

(1) (*a*) The wife of a Muslim is not (for claiming pre-emption) a co-sharer with him in his property during his life-time,[13] (*b*) nor is a Hindu widow who—(i) by virtue of a compromise with the brother of her deceased husband, is in possession of property for her life, the compromise containing strict provisions against her alienating it,[14] (ii) nor if she is in possession of the property of her husband in lieu of maintenance, even though under a decree of Court ;[15] (iii) but if she has inherited it from her husband, she is the owner of it.[16] (iv) A Hindu widow in possession of a share in a village, holding a widow's estate, relinquishes it to her daughter : held the daughter may pre-empt in respect of a sale prior to the relinquishment.[17] (v) Members of a joint and undivided Hindu family, though not recorded in the Collector's book as sharers in the mahal, are co-sharers.[18] *Illustrations.* (6) Wife.

(2) S makes a gift of his mansion to R in 1900. In 1901 an adjacent mansion is sold. Then S revokes the gift he had made. S has no claim to pre-empt,[19] because S was not owner of the mansion at the time when the ground for pre-emption (s. 522(2)(*a*).) arose.

(3) Part of a land is WAKF, and the other part belongs to S, who sells it to B. Neither the mutawalli nor the beneficiary under the wakf, " not even if he be a single individual," can pre-empt.[20] If a mansion by the side of a wakf were sold, the wakif would have no claim to pre-empt ; nor the mutawalli or superintendent.[21] These two statements are from Shia and Sunni texts respectively. But under the Punjab Pre-emption Act II. of 1905, s. 13(1), (*seventhly*), the mutawalli could pre-empt.[22] That Act is now repealed, see s. 557, pp. 726 ff. (7) Wakf. (8) Mutawalli.

(4) The pre-emptor sells his own share of the land before he is informed of the ground for pre-emption ; the claim to pre-empt is lost.[23]

(5) S sells land to B, reserving an option to himself to cancel the sale ;

[12] *Lala Prag Dutt* v. *Bandi Hossein*, (1871) 7 Beng. L. R. 42 ; s. c. *Lalla Puriag Dutt* v. *Bundey Hossein*, 15 W. R. 225 ; on review *vice versa* (1871) 16 W. R. 110.

[13] *Fida Ali* v. *Muzaffar A.*, (1882) 5 All. 65 ; cf. *Amjad Ali* v. *Mushtaq Ahmad*, (1895) 17 All. 454 = [1895] 15 All. W. N. 95 ; (1897) 17 All. W. N. 121.

[14] *Imamuddin* v. *Surjaiti*, [1895] 15 All. W. N. 85.

[15] *Dila Kuari* v. *Jagarnath Kuari*, (1887) 6 All. 17 ; *Karan S.* v. *Muhammad Ismail K.*, (1885) 7 All. 860 ; *Bhupal S.* v. *Mohun S.*, (1897) 19 All. 324, following (i) *Phopi Ram* v. *Rukmin Kuar*, [1895] All. W. N. 85 ; (ii) *Imamuddin* v. *Surjaiti*, [1895] 15 All. W. N. 85.

[16] *Phulman Rai* v. *Dani Kaur*, (1877) 1 All. 452.

[17] *Muhammad Yusuf A. K.* v. *Dal Kuar*, (1898) 20 All. 148 ; *Nabiban B.* v. *Shaikh Medu*, (1905) 2 All. L. J. 775 (Muslim widow recorded as in POSSESSION IN LIEU OF MAHR, may pre-empt in her capacity as heir of her husband).

[18] *Gandharp Singh* v. *Sahib Singh*, (1885) 7 All. 184 (pre-emption allowed).

[19] Bail. I. 126 (par. 3).

[20] Bail. II. 178 ; I. 473 (6th).

[21] Bail. I. 474 (*ll.* 12-14) (478-479).

[22] *Jinda Ram Husain Baksh*, (1914) 69 Punj. Rec. 197 (No. 59).

[23] Bail. II. 191, (*fourth*). Shaikh holds otherwise (see s. 532(3), p. 697, *n.* 4).

**SECTION 541H.** then subsequently the adjoining house is sold ; S can pre-empt the house under Hanafi law (being the neighbour). But if the option to cancel the first sale had been reserved by B, (and not by S), then B would have had the right to pre-empt the adjoining land. Now if P has the right of pre-empting S's land, he may pre-empt that land, but he does not on the second sale (viz. of the adjoining house) acquire the right of pre-empting the adjoining house, which S or B, as the case may be, may pre-empt, P's disqualification being that he was not owner of S's land at the time when the ground for pre-empting the adjoining house (viz. the first sale) arose.[24]

(6) Subsequently to the sale constituting the ground of pre-emption a co-sharer sells his share to a stranger. That stranger has no claim to pre-empt as a co-sharer under a wajibu'l-arz which gives the right to co-sharers.[25]

(7) P brings a suit claiming pre-emption. It is dismissed on the contention that she has no interest in possession in the land. She files an appeal. Eight days after, her share in the land is sold in execution of a decree in another suit ; *held*, that (*a*) want of possession does not affect the right of joint owners to pre-empt ; (*b*) the sale of the share pending the suit, cannot prejudice her rights which existed at the time when the suit was instituted.[26]

(8) On 20 June 1907, P purchases a share in a zamindari at an auction sale in execution of a decree. The sale is confirmed on 24 June. On 23 June S sells his share in the same zamindari to B. *Held*, that under the Civil Procedure Code, 1882, s. 316, P acquired the share on 24 June and so was not entitled to pre-empt. But under the Civil Procedure Code of 1908, s. 65, the property is vested in the auction purchaser from the date of the sale, and not from the time when the sale becomes absolute.[27]

(9) Two persons, P and S, do not become each other's khalits (*a*) by reason of P irrigating his field in one mahal from a well belonging to S situated in another mahal,[28] nor (*b*) of having the same burial ground and chaupal (i.e. village meeting place).[29]

(10) Pending P's suit for pre-emption, a decree for partition is made on 1 July under an application originally commenced by P, but from which P has withdrawn. On 9 July the Court dismisses P's suit for pre-emption on the ground that, by reason of the partition, he is no more a co-sharer in the property ; and this is upheld in first and second appeal.[30]

[24] Hed. 560 (col. i. par. 3). See s. 541A.

[25] *Sheo Narain* v. *Hira*, (1885) 7 All. 535. *Ill.* (4) & (6) are converse of each other. (5) & (6) are obalogous.

[26] *Sakina B.* v. *Amiran*, (1888) 10 All. 472 (Mahmood, J.). But, *semble*, where sale voluntary, it may = WAIVER of pre-emption : *Ram Gopal* v. *Piari L.*, (1899) 21 All. 441 ; cf. *Nuri* v. *Ambica*, (1916) 44 Cal. 47, 58 (*l.* 22). See s. 541D. p. 708.

[27] *Hasan Ali* v. *Mian Jan K.*, (1910) 33 All. 45. See s. 541D ; *Sakina B.* v. *Amiran*, (1888) 10 All. 472.

[28] *Munna* v. *Hajira*, (1910) 33 All. 28, 33.

[29] *Abdul Rahim K.* v. *Kharag S.*, (1893) 15 All. 104 (right to burial ground & *chaupal* being common to all inhabitants of place, could hardly be deemed APPURTENANCES to ownership of land).

[30] *Tafazzul Hussain* v. *Than S.*, (1910) 32 All. 567. See *Nuri Mian* v. *Ambica Singh*, (1916) 44 Cal. 47, 49, 58 *l.* 22.

(11) S takes a building lease from P, and erects a house on it ; *held*, that P has no claim to pre-emption, as he is neither a co-sharer nor a participator in the appendages of the house, nor owner of neighbouring land [31]—*sed quaere*. SECTION 541H.

The meaning of the term "stranger" in the law of pre-emption, has been considered.[32] The word khalit is not improperly used to designate in a plaint for pre-emption, a sharik or partner in the substance of a thing ; and if it is not clear whether the plaintiff claims as sharik or khalif, it may be shown by express words, or inferred from the written statement.[33] Sharik may refer to a person occupying other houses in the same mansion.[34] A claim as khalit was not allowed to be amended into a claim as a neighbour.[35] Stranger and one having community of interest.

On the question whether one co-parcener can claim pre-emption when another co-parcener is the vendor, see s. 527, pp. 681 ff. Co-parcener purchaser.

For territorial extent of the law of pre-emption, see s. 523 A, pp. 666 ff. Territorial extent.

**542.** Any person who is competent to hold property is competent to pre-empt.[1] Where the right arises under a contract or custom, it may be restricted to persons competent to contract,[2] or otherwise. III. Competence to pre-empt. (*a*) Majority.

The Government, by acquiring land permanently, does not, for purposes of pre-emption, become a co-sharer in the village to which the land originally appertained, and the provisions contained in the wajibu'l-arz dealing with sales by co-shares in the village are not applicable.[3]

**543.** Under Shia law the father or grandfather may pre-empt the share of his minor child or grandchild in property which belongs to them jointly ;[4] *sed quaere* in India. (*b*) Fiduciary relations. (Shia law). (1) Guardian : ward's property.

The father and grandfather are the legal guardians of the property of their minor child or grandchild. It is explained in the texts that their pre-empting the minor's share is tantamount to purchasing it (which is permitted under Shia law).[5] In India a purchase by the guardian of his ward's property would not be permitted.[6] (2) Guardian trustee.

[31] *Pershadi Lal* v. *Irshad Ali*, (1870) 2 N. W. 100.

[32] *Fida Ali* v. *Muzaffar Ali*, (1882) 5 All. 65. Cf. *Baldeo* v. *Badri Nath*, (1909) 31 All. 519 ; *Mahomed Tukee* v. *Hujjee alias Khujjai*, (1873) 5 N. W. 142.

[33] *Lala Prag Dutt* v. *Bandi Hussein*, (1871) 15 W. R. 255 (= p. 711, *n.* 12) on review 16 W. R. 10. See s. 541 H.

[34] *Gurreboollah K.* v. *Kebul Lall Mitter*, (1870) 13 W. R. 124.

[35] *Gobind Row* v. *Girdharee Sahoo*, (1875) 24 W. R. 124.

[1] Bail. I. 473 ; II. 110 (par. 2); (*Mt.*) *Punna* v. *Juggur Nath*, (1866) 1 Agra 236 ; *Ram Khelawun Rai* v. *Shiva Dass*, (1867) 2 Agra 76 ; *Jinda Ram* v. *Husain Bakhsh*, (1914) 49 Punj. Rec. 197, 200 (No. 97).

[2] *Raja Ram* v. *Bansi*, (1876) 1 All. 207.

[3] *Gaya Singh* v. *Ram S.*, (1905) 28 All. 235.

[4] Bail. II. 180 (par. 4). See com. Cf. *Amir Haidar* v. *Ali Ahmad*, (1925) 47 All. 635.

[5] Bail. II. (par. 4).

[6] Cf. Guard. & Wards Act. s. 20. See s. 272 above.

SECTION 543. (3) Executor.

May an executor pre-empt? The question is answered in the Sharai'ul-Islam (Shia text) in the affirmative.[6] *Sed quaere* in India.

Pre-emption by guardian on behalf of ward.

**544.** (1) Pre-emption may be claimed on behalf of a minor [7] or person of unsound mind, by his guardian, [or of one who is absent [7] by his agent,[8]] or of a disqualified proprietor by his manager appointed by the Court of Wards,[9] provided that it is for the benefit of the ward to pre-empt.[7]

Avoiding such pre-emption.

(2) *Quaere,* whether where pre-emption is enforced by a guardian for his ward, and it is not for the ward's benefit, he may avoid it on attaining majority, or becoming sound of mind.[7]

V. PRIORITIES AMONGST PRE-EMPTORS.

(A) (1) Co-sharers. (2) Khalits. (3) Neighbours.

**545.** Co-sharers [10] in the land have priority in the right to pre-empt over participators in appendages,[11] and the latter have priority over neighbours.[12] *Quaere,* whether generally those whose interest in the land is closer have priority over those whose interests are less close ; [13] but it has been held that

[7] Cf. s. 271 ; Bail. II. 110 (par. 2): difficult to appreciate reference to absent person. Cf. *Amir Haidar* v. *Ali Ahmad*, (1925) 47 All. 635.

[8] *Shamsuddin* v. *Alauddin*, [1931] 29 All. L. J. 1083 (previous authority from pre-emptor to make demand, necessary).

[9] *Jadu Lal* v. (*Maharani*) *Janki Koer*, (1912) 39 I. A. 101 = 39 Cal. 915 (both (i) under Court of Wards Act, Bengal Act IX. of 1879, s. 40 & (ii) independently of provisions of that section).

[10] Bail. I. 476 (*ll.* 1-2): "A SHARIK (or partner in the substance) is preferred to a KHALIT (or a partner in its rights as of water or of way)." The explanations within the parentheses are from the *Hidaya*, vol. iv., p. 1 (413)—Bail. I. 470, *n.* 1 (481). *Khalit* = 'mixed with.' Though rights of water & way given as examples, it does not appear, says Baillie, that a khalit in any other right than these has the right of pre-emption. Bail. I. 476 (481), *n.* 1. See however ss. 541 G-H, comm. Cf. Punjab Pre-emption Act, s. 17 & Oudh Laws Act, s. 9 : s. 557, p. 727, (4).

[11] Hed. 548, 549 ; Bail. I. 476. See com., p. 716. *Ranchoddas* v. *Jugaldas*, (1899) 24 Bom. 414 ; *Golam Ali K.* v. *Agurjeet Roy*, (1872) 17 W. R. 343 ; *Hur Dyal S.* v. *Heera Lall*, (1871) 16 W. R. 107 ; *Gopal Sahi* v. *Ojoodhea Pershad*, (1865) 2 W. R. 47 ; *Khairuddin* v. *Gulam Mohiuddin*, (1914) 49 Punj. Rec. 147 (No. 43).

[12] *Karim* v. *Priyo Lal Bose*, (1905) 28 All. 127 ; *Chand K.* v. *Niamat K.*, (1864) 3 Beng. L. R. (A. C.) 296.

[13] (i) *Syeeduddin* v. *Latifunnissa*, (1921) 44 All. 114 ("no authority has been cited before us which lays down that the Muhammadan law recognizes DEGREES OF NEARNESS IN THE SAME CLASS OF PRE-EMPTORS : e.g. all who come within the definition of *shafi sharik* stand on the same footing." (ii) Priority does not seem to be alluded to in *Jadu Lal Sahu* v. *Janki Koer*, (1912) 39 I. A. 101 which was mainly relied upon. But (iii) seems implied in Bail. I. 476 (last line) (481) "because they are more specially intermixed with it." (iv) (*Mt.*) *Bibi Saleha* v. *Haji Amiruddin*, (1928) 8 Pat. 251 (MUQARRARIDAR holding under co-sharer has no right to pre-empt as against co-sharer : Das, J., pits Sultan Ahmed, J., vs. Sir Sultan Ahmed with evident enjoyment). See s. 539, p. 701. In LARGE ESTATES neighbours have no right of pre-emption, but co-sharers have : on "very sound principle, viz. that the right should be co-extensive with the inconvenience which it is intended to avoid," (*per* Mitter, J.): (*Sheik*) *Mahomed Hossein* v. (*Shah*) *Mohsun Ali*, (1870) 14 W. R. (F. B.) 266 = 6 Beng. L. R. 4 (penult. sent.); & (v) Syed Ameer Ali says if P has right of way over land, & PA has right to discharge water of his house on it, or if P is nearer neighbour than PA, then, in either case, P has priority over PA (*Mahom. Law*, I. 602 (719) no authority cited). (vi) Cf. on CONSTRUCTION OF WAJIBU'L-ARZ : *Lakhan Singh* v.

a khalit who is also a neighbour does not have any priority over another who is not a neighbour [14] and that a co-sharer who is a neighbour [or khalit] has no priority over a co-sharer who is not a neighbour [or khalit].[15] SECTION 545.

*Illustrations.*

(1) P is joint proprietor of part of the land sold, and PA has property contiguous to the whole of the land ; P has priority over PA.[16]

(2) (i) Joint owners of a beam laid on the top of the wall, are classed as neighbours. (ii) Laying beams on the wall of a neighbouring house, does not convert a neighbour into a joint owner.[18] (iii) If one has the right of collateral support from the party wall separating his property from that of his neighbour, he does not become his khalit.[17]

(3) S and P are joint owners of a house in a street ; S agrees to sell his share in it to B ; (*a*) P has the first right of pre-emption ; (*b*) if P waives it, it belongs to the inhabitants of the street equally, without any distinction between those who are contiguous, and those who are not, for they are all khalits in the way ; (*c*) if they all surrender the right, it belongs to a musalik or contiguous neighbour, who is not a khalit in the way.[18]

(4) (i) S[19] and P are joint owners of a house in a public road with a right of way over a private street ;[20] (ii) PA owns a house in the private street having a right of way over it ; (iii) PB is the owner of a house situated in the public road, adjoining[21] S and P's house, without participating in the right of way. Then (i) P is S's co-sharer, (ii) PA his khalit, and (iii) PB his neighbour. The same is the case if the houses of S and P, PA and PB are all of them in the same "mansion" [compound or enclosure], and PA has the same entrance from the public road but PB has a separate door [passage] of his own.[22]

(5) The owner of land through which the property pre-empted receives irrigation, has priority over a neighbour.[23]

(6) S and P had certain proprietary rights in an eight annas patti of a certain mahal. S mortgaged his share in the patti to B and BA. The mort-

*Bishen Nath*, (1910) 33 All. 299 ; *Jasoda Nand* v. *Kandhaiya Lal*, (1891) 13 All. 373 (provision in *wajibu'l-arz* preferring CO-SHARER OF SAME FAMILY to stranger) ; distinguishing *Ram Prasad* v. *Abdul Karim*, (1887) 9 All. 513.

[14] See *ill.* (3) ; *Karim Baksh* v. *Khuda B.*, (1894) 16 All. 247.

[15] *Roshun Mahomed* v. *Mahomed Kuleem*, (1867) 7 W. R. 150.

[16] Hed. 549 (col. i. par. 3).

[17] *Ranchoddas* v. *Jugaldas*, (1899) 24 Bom. 414 ; cf. *Karim* v. *Priyo Lal*, (1905) 28 All. 127.

[18] Bail. I. 476 (481) ; or rather private way, which is not thoroughfare ; Bail. I. 476 (481) *l.* 9, 477 (482) *ll.* 8-15 ; *Gooman Singh* v. *Tripool Singh*, (1869) 8 W. R. 437.

[19] Bail. I. 476-477 (481-482).

[20] Or right of watering their vineyards from small channel. Bail. I. 477 (482) *ll.* 16 ff.

[21] Not on opposite sides of thoroughfare. Bail. I. 477 (482) *l.* 10.

[22] Bail. I. 476-477 (481-482).

[23] *Chand Khan* v. *Naimat K.*, (1869) 3 Beng. L. R. (A. C.) 296 = 12 W. R. 162.

SECTION 545. *Illustrations.*

gagees foreclosed. B's brother had a small share in the other eight annas patti of the same mahal. *Held*, that P was entitled to pre-empt, for though the co-parcenery of the mahal could not be said to have ceased, nor those who were co-parceners in it to have become strangers to one another, yet there being a finding that the pattis were separate, a partition by metes and bounds was not necessary, and that a private partition, if full and final between the parties, would have the same effect on rights of pre-emption as a formal partition.[24]

(7) S is entitled to and sells the upper floor of a house together with a right of way through the house of a third party to P ; PA is the owner of the lower floor underneath S's floor ; *held*, that P is a khalit and has priority over PA who is only a neighbour,[25] *sed quaere.*

(8) In a pattidari village the shares in each patti have priority in the right to pre-empt in that patti.[26]

No priority is obtained by the pre-emptor being the buyer in the first instance ; all persons whose claim of pre-emption is equal (s. 522(2)(*b*)(*c*), p. 663) in respect of priority in the right to pre-empt are entitled to buy the property equally : s. 527, pp. 681 ff.

Where the right is claimed under a wajibu'l-arz, the priorities depend upon the terms of the wajibu'l-arz which may be on a principle differing from that of general Muhammadan law : see s. 523, p. 665 ; s. 524 A, p. 673. For instance, priority may be given to share-holders in a patti, then to those in a mahal, and lastly to those in a village. Such priorities may subsequently be taken away by a new arrangement.[27] Where two co-sharers bring two separate suits claiming pre-emption, the one that has instituted the first suit has no necessary priority. A decree may be made in favour of each plaintiff in respect of half of the property.[28]

(B) On waiver by prior pre-emptor accrual to next in degree.

**546.** On the prior [29] pre-emptor waiving or forfeiting his claim to pre-empt (s. 548) the pre-emptor next in priority becomes entitled to do so ; [30] provided that he asserts his claim immediately on getting information of the sale [31] and confirms and enforces his claim in compliance with ss. 528-530.

[24] *Digamber Misser* v. *Ram Lal Roy*, (1887) 14 Cal. 761.

[25] *Ganeshi Lall* v. *Luckman Dass*, (1873) N. W. 31 (custom amongst Hindu residents of town). Should not PA be considered to be co-owner of the house? Persons owning parts of same house seem to be more than neighbours.

[26] *Maharaj Singh* v. *Bhechook Lal*, (1864) 1 W. R. 233. Cf. *Farzand Ali* v. *Alimullah*, (1879) 1 All. 272 ; *Sangam Ram* v. *Sheobart Bhagat*, (1882) 3 All. 112 ; *Mahabir Parshad* v. *Debi Dial*, (1879) 1 All. 291.

[27] *Daria* v. *Harkhial*, (1909) 31 All. 274 ; *Yad Ram* v. *Cheda Lal*, (1913) 35 All. 478.

[28] *Salig Ram* v. *Kali Shankar*, (1905) 27 All. 465.

[29] Persons equal in priority : ss. 522(2)(*b*), 527, 547, pp. 663, 681, 716.

[30] Hed. 549 (col. i.) ; Bail. I. 476 (481). Abu Yusuf holds that prior pre-emptors absolutely exclude those after them, so that latter cannot come in at all.

[31] He must NOT WAIT TILL HE HEARS of waiver : Bail. I. 482 (*ll.* 11-14) (488) : So that he must assert his claim at same time as prior pre-emptor, if both hear of sale together.

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(C) PRE-EMPTORS EQUAL IN DEGREE share equally.

**547.** Pre-emptors equal in degree are, under Hanafi law, entitled to pre-empt in equal shares, notwithstanding that they are co-sharers holding unequal shares in the land.[1] Under Shafii law the rights of co-sharers are in proportion to their respective shares.[2] The Hanafi rule has been applied to pre-emption under a wajibu'l-arz.[3]

*Illustrations.*

(1) S, P, PA, and PB own a plot of land jointly in following shares : S 3/8, P 1/3, PA 1/6, PB 1/8. S sells his 3/8. Then under Hanafi law—

(*a*) P, PA, and PB can each take a 1/3 of the 3/8, i.e. 1/8 of the whole ;

(*b*) if P waives his claim before it has been enforced, then S's 3/8 belongs to PA and PB in equal shares (i.e. 3/16 each) : see s. 548.

(*c*) P is absent, and PA and PB alone claim pre-emption, they each take S's 3/8 equally (i.e. 3/16 of the whole). Afterwards P appears and claims his share ; he must get 1/16 from PA and PB each so as to make up his 1/8. If after PA and PB enforce their claims, PA waives his claim,[4] then PA's share lapses and does not accrue to P and PB : see s. 548.

(2) S sells land. PA a neighbour, pre-empts in the absence of P (who is a khalit, thus having a claim of pre-emption prior to PA). Afterwards P returns, and claims to pre-empt. He gets the whole of the land from PA.[5]

Hanafi and Shafii law as to proportion of rights of co-owner.

Mahmood, J., has defended the equity and justice of the rule of Hanafi law that each co-sharer should have an equal share in the land pre-empted, saying that the reason upon which the law of pre-emption is framed is that the intrusion of a stranger is disagreeable to the pre-empted property : "This disagreeableness is not to be estimated in reference to the share in the property possessed by each pre-emptor, but in reference to each pre-emptor personally, and I hold that the equitable rule is to apportion the rights of the pre-emptors per capita."[6] In speaking of "the well-known rule of Muhammadan law," has Imam Shafii's different opinion been overlooked ? A co-sharer may have an infinitesimally small share in the property. Is it fair that he should be placed on terms of equality with another co-sharer whose interest in the property is substantial ?

(D) On one joint pre-emptor waiving his claim the other joint-pre-emptors become entitled to whole.

**548.** On a joint pre-emptor [7] waiving his claim, the other acquires the right to pre-empt the whole land ; [7] provided (1)

[1] Hed. 549 ; Bail. I. 494-495 (500-501); *Baldeo* v. *Badri Nath*, (1909) 31 All. 519 ; *Amir Hasan* v. *Rahim Baksh*, (1897) 19 All. 466 = p. 682, *n.* 24 ; *Maharaj Singh* v. *Lalla Bhechuk Lal*, (1865) 3 W. R. 71 (as to CO-SHARER); (*Mist*) *Khem Kurun* v. *Seeta Ram*, (1870) 2 N. W. 257 (as to NEIGHBOUR). Cf. s. 527, p. 682, *n.* 24.

[2] *Minhaj*, 208 (par. 2) (Bk. 18, s. 2); Hed. 549 (col. ii., par. 3).

[3] *Jai Ram* v. *Mahabir Rai*, (1885) 7 All. 720, 728 ; see com.

[4] Bail. I. 494-495 (500-501); Hed. 549-550.

[5] Bail. I. 495 (par. 3) (501, par. 3) Hed. 550.

[6] *Jai Ram* v. *Mahabir Rai*, (1885) 7 All. 720, 728.

[7] Singular includes plural in s. 548 & *vice versa*. Hed. 549 (col. ii.); Bail. I. 494, 495 ( par. 2) (500-501); *Shamsuddin* v. *Alauddin*, [1931] 29 All. L. J. 1083 (one plaintiff being disqualified from pre-empting because he had not made demand—

SECTION 548. that the waiver is made before either the Court has decreed pre-emption,[8] or possession of the land been transferred to the joint-pre-emptors without such decree ; [after either of the said events, the rights of the pre-emptor who waives them lapse, and do not accrue to the other joint pre-emptor] ; [9] and

And must exercise the whole or waive the whole claim.

(2) where one joint pre-emptor so acquires the right of the other, he must either pre-empt or relinquish the whole land ; he cannot lawfully pre-empt the share either only of himself, or only of the other pre-emptor.[10]

*Illustration.*

P and PA being pre-emptors equal in degree (under a wajibu'l-arz), bring two rival suits to enforce their claims. The Court gives to P and PA decrees respectively for a 3 annas and a 2 annas 6 pies share, conditionally on their paying the price within 30 days ; and directs that in case P makes default in payment, PA should have the right to pre-empt P's share, on paying the price of that share within 15 days of such default, and vice versa. Both P and PA make default in paying within 30 days ; and then PA pays into Court (within 15 days of the default by P) the price of P's share ; *held*, (affirming Mahmood, J.,) that PA's claim is inadmissible, as the price does not cover the whole subject of pre-emption.[11]

## § 7.—LEGAL EFFECTS OF PRE-EMPTION.

I. GENERAL effect of enforcing the right :

**549.** (1) On the claim of pre-emption being enforced, the pre-emptor acquires the rights, and becomes subject to the obligations, arising between the buyer and the seller under the sale ; [12] provided that the pre-emptor is not entitled to the buyer's option for three days under the texts on Muslim law[13] of cancelling the sale ; but, *semble*, he has the options of inspection and defect ; [14] except in so far (if at all) as the said options are inconsistent with the terms of the decree for pre-emption made by the Court.

Pre-emptor comes in place of buyer.

Buyer becomes vendor of pre-emptor.

(2) If the sale has been completed when the claim to

does not make suit of other plaintiffs defective) ; *Chotu* v. *Husain Bakhsh*, [1893] A. W. N. 25 ; *Lal Behari Misra* v. *Equeen Md. Hajjam*, [1926] AIR (ALL.) 722 = 97 Ind. Cas. 340 (joining persons possessing right to pre-empt, but disqualified in equity, does not amount to waiver : acquiescence in sale at FRAUDULENTLY INFLATED PRICE does not estop).

[8] Where decree itself conditional on something being done (e.g. payment of price), right cannot be said to be decreed until condition fulfilled : *ill.* (1).

[9] *Ibid* ; *quaere*, can it be waived after being enforced without consent of vendor or vendee ?

[10] See s. 548, *ill.* ; s. 540, com. ; *Abdul Khan* v. *Shakira B.*, (1927) 50 All. 348.

[11] *Arjun S.* v. *Sarfraz S.*, (1888) 10 All. 182.

[12] Bail. I. 473 (par. 3) (477) ; II. 195 (*ill.* 4-6) ; *Shankar Lal* v. *Hashmi Begam*, (1932) 54 All. 1023, 1025.

[13] Hed. 560 (col. i. par. 2).

[14] Hed. 553, (col. i. par. 4). See com.

pre-empt is enforced, the original buyer becomes the new seller, with the pre-emptor as the new buyer.[15] SECTION 549.

(3) The pre-emptor does not become liable for any contingent charges incurred by the buyer, such as brokerage, agency, or the like.[16] Contingent charges.

(4) The buyer is entitled to receive or retain the rents and profits of the land during the interval between the date of its sale to himself, and its transfer [17] to the pre-emptor.[18] Rents and mesne profits.

(5) A pre-emptor is not entitled to put the seller to proof of his title to the land.[19] Proof of title.

(6) It is doubtful whether a claim to pre-empt creates an interest in the land.[20] Interest in land.

*Illustrations.*

(1) S agrees to sell to B land which is mortgaged to M for Rs. 50. P enforces his claim to pre-empt and take possession of the land. P is liable to M for payment of the mortgage debt, notwithstanding that P had no notice of the mortgage at the time when he claimed pre-emption.[21]

(2) S sells property to B, in Sep. 1908, for Rs. 1,150. P has the right to pre-empt it; but before his suit for pre-emption is barred, B sells to a third party, BA, for Rs. 4,000. *Held*, P is entitled to pre-empt the property on the terms of the sale of Sep. 1908 (viz. at Rs. 1,150) making BA a party to the proceedings.[22]

(3) During the pendency of a suit for pre-emption, the buyer re-sells the property to a person who originally had a right to pre-empt prior to that of the plaintiff, but who at the date of the sale is barred by limitation from enforcing it. *Held*, that the plaintiff's claim is not defeated by the re-sale.[23]

Whether pre-emptor takes from buyer or seller.

It is stated that the pre-emptor takes the property from the buyer, and not the seller;[24] and that the buyer must always be a party to the suit,[25] but

[15] Bail. I. 490-491 (496-497): sale having been completed, the original buyer has become owner. See com.

[16] Bail. II. 182.

[17] Under s. 551.

[18] *Deokinandan* v. *Sri Ram*, (1889) 12 All. 234 (F. B.); Mahmood, J., dissenting, held buyer entitled to profits until he actually obtained possession. See also *Ajudhia* v. *Baldeo S.*, (1884) 7 All. 674; *Deonadan Prashad S.* v. *Ramdhari C.*, (1916) 44 Cal. 575, 686 (P. C.); *Deo Dat* v. *Ram Autar*, (1886) 8 All. 502 as to MESNE PROFITS. Point now covered by form in which decree to be framed: s. 550(3), com., p. 721. Cf. s. 539, *ill.* (2), p. 702.

[19] *Sahodra B.* v. *Bagishri S.*, (1915) 13 All. L. J. 711 (plaintiff alleged that vendor entitled to much smaller share in property than he purported to sell, but that if Court found that vendor entitled to whole property then plaintiff willing to pre-empt whole). Cf. *Brooke* v. *Garrod*, (1857) 2 De G. & J. 62 = s. 523, *n.* 5(iv).

[20] *Sitaram Bhaurau Sayad Sirajul K.*, (1917) 41 Bom. 636, 650. See p. 720, *n.* 28.

[21] *Tejpal* v. *Girdhari Lal*, (1908) 30 All. 130.

[22] *Khettar Chandra Basu Mallik* v. *Nabin Kali Devi*, (1913) 35 All. 385; *Kamta Prasad* v. *Mohan Bhagat*, (1909) 32 All. 45.

[23] *Kamta Prasad* v. *Ram Jog*, (1913) 36 All. 60.

[24] Bail. II. 185 (par. 3) *n.* 7; cf. Bail. II. 175 (*ill.* 1-3), 183 (par. 2).

[25] Hed. 553 (col. i.); Bail. I. 485 (*ll.* 26-33) (491).

SECTION 549. after he has taken possession of the land, the presence of the seller may be dispensed with ;[26] even before the buyer has taken possession he is said to be the proprietor, and the seller the possessor : still, if, before the sale is completed by transfer of possession to the buyer, the pre-emptor claims it from the buyer, he may require the pre-emptor to take it direct from the seller.[25]

These incidents of pre-emption may have been in the minds of judges[27] who speak of the pre-emptor taking the property from the buyer and of the seller passing out of the transaction. Mahmood, J., and his colleagues held, however, upon the texts cited by him that the original notion underlying pre-emption was different.[28]

The successful pre-emptor's interest in the property pre-empted, before he has paid the amount fixed by the decree for pre-emption in his favour, has been held to be an interest which is not liable to attachment or sale.[28]

II. TIME when land transferred to pre-emptor.

**550.** (1) The land or subject of pre-emption[1] is not transferred to the pre-emptor, unless (either under a decree of the Court or otherwise) possession is given to and taken by the pre-emptor.[2]

Pre-emptor insisting on decree of Court.

(2) The pre-emptor may refuse to take possession of the land without an order of the Court, notwithstanding that the buyer or seller may be willing to transfer it to him.

III. FORM OF DECREE.

(3) The Court in decreeing[3] a claim to pre-emption (*a*) specifies a day on or before which the purchase money[4] shall be paid,[5] and orders that (*b*) on such payment into Court, together with the costs decreed possession of the land shall

[26] *Hira Lal* v. *Ramjas*, (1883) 6 All. 57.

[27] *Kudratulla* v. *Mahini Mohan Shaha*, (1870) 4 Beng. L. R. (F. B.) 134 = 13 W. R. (F. B.) 21 : per Peacock, C. J., Mitter, J. ; *Chundo* v. *Alimoodin*, (1873) 6 N. W. 28 ; *per* Parson, J. See s. 524. penut. par. of com., p. 673.

[28] *Gorakh Singh* v. *Sidh Gopal*, (1906) 28 All. 383. See Civ. Pr. Co., 1908, s. 60(*m*) [=1882, s. 266(*k*)] : " An expectancy of succession by survivorship or other merely contingent or possible right or interest...shall not be liable to such attachment or sale." See p. 719, *n.* 20.

[1] Or " the property " or " the land " : s. 522(2)(*a*), p. 662 : Hed. 550 ; Bail. I. 485.

[2] Hed. 550 : Bail. I. 485 (491). Refusal of pre-emptor to take possession would, no doubt, be considered by Court in dealing with costs. The seller, it is said, must be party to suit for pre-emption, so long as possession not transferred to purchaser,—after which he need not be party.

[3] *Shankar Lal* v. *Hashmi Begam*, (1932) 54 All. 1023, 1025 (result of decree not a resale by purchaser to pre-emptor).

[4] It is sufficient compliance with such order to deposit purchase-money less costs due to pre-emptor : *Ishri* v. *Gopal Saran*, (1884) 6 All. 551 ; *Parmanand Root* v. *Gobardhan Sahai*, (1906) 28 All. 678 = 3 All. L. J. 804 ; *Bichai S.* v. *Shami Nath*, (1910) 8 All. J., notes, 27 ; *Ali Husain* v. *Aminullah*, (1912) 10 All. L. J. 153 though different view taken by Tyrrel, J., in *Balmukand* v. *Pancham*, (1888) 10 All. 400. See *n.* 7.

[5] Where there was appeal against order that money be paid within a month : pending appeal, time expired : *held*, by High Court that dismissal by appellate Court on this ground wrong, inasmuch as condition was itself subject of appeal ; *Khurshedun-nissa* v. *Alim-un-nissa*, (1912) 10 All. L. J. 421.

be delivered to the pre-emptor, or, where there are several pre-emptors equal in degree, to them respectively, in proportion, to the right of each ; (*c*) that title to possession accrues from the payment ; but (*d*) that if the purchase money and the costs are not so paid, the suit is dismissed with costs.[7] SECTION 550. Form of decree.

(4) A decree for enforcing pre-emption is a purely personal one and cannot be transferred.[8] Decree not transferable.

The Civil Procedure Code, O. XX. r. 14(1) contains the form as above stated for a decree in a pre-emption suit. Under r. 14(2) where the Court adjudicates upon rival claims to pre-emption,—

1.—Payment of consideration.
2.—Delivery of possession.
3.—Several claims,—

(*a*) if the claims decreed are equal in degree, O. XX., r. 14(1) takes effect in respect of a proportionate share of the property, including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect ; and, (*a*) equal in degree.

(*b*) the claim of the inferior pre-emptor does not take effect until the superior pre-emptor has failed to comply with the said provisions. (*b*) different in degree.

The form of the decree in terms provides for several matters that follow as the result of the law laid down in the texts.[9] Thus, (i) where after making an assertion and demand of a claim to pre-emption, but before enforcing it, the pre-emptor dies, or forfeits his claim, (e.g., if he sells the property, from the ownership of which the right to pre-empt arises), the claim becomes void under the Muslim texts [10] (see however s. 532, pp. 696 f.); (ii) the pre-emptor is entitled to the profits of the land accruing after he has, by payment of the purchase-money, enforced pre-emption,[11] notwithstanding that there may be delay in the formal transfer of the land,[12] but (iii) he is not, before payment,[13] entitled to the rents and profits ;[13] (iv) as soon as the payment is made

4.—Payment into Court effectuates the transfer or completes pre-emption.

Mesne profits.

[6] See com. Under Hanafi texts, purchaser may refuse to give possession of land to pre-emptor until pre-emptor pays price for it : notwithstanding that Court may have ordered him to deliver it ; Hed. 552 (col. ii. par. 3).

[7] *Debi Saran Tiwari* v. *Guptar Tiwari*, (1914) 36 All. 514 (appellate Court in pre-emption suit enhanced amount decreed as payable by pre-emptor, but omitted to fix time within which enhanced amount to be paid, pre-emptor held entitled to reasonable time for payment having regard to enhanced amount (Rs. 801): time within which in fact paid (one month & one day after decree) reasonable : plaintiff entitled to execute decree).

[8] But this cannot prevent pre-emptor mortgaging property subsequently to decree for purpose of paying price : *Bela Bibi* v. *Akbar Ali*, (1901) 24 All. 119 ; or even selling it to stranger permitting him to pay purchase-money into Court : *Ram Sahai* v. *Gaya*, (1884) 7 All. 7. See s. 537 (*expln.*).

[9] Cf. *Deonadhan Prasad S.* v. *Ramdhari C.*, (1916) 44 I. A. 80 = 44 Cal. 675, decided on Code of Civ. Proc. 1882, s. 214, which however, was less elaborate than corresponding provision in O. XX., r. 14. See *n.* 13.

[10] Bail. I. 485 (491). [11] *Deo Dat* v. *Ram Autar*, (1886) 8 All. 502.

[12] *Deokinandan* v. *Sri Ram*, (1889) 12 All. 234 (F. B.), (decree vests ownership in pre-emptor from date of payment of price : vesting not postponed till possession obtained) ; *Buldeo Pershad* v. *Mohun*, (1866) 1 Agra (REV.) 30. See *n.* 13.

[13] Hed. 553 (col. ii. par. 3) decree under O. XX., r. 14(1)(*b*) provides for this : " whose title shall be deemed to have accrued from the date of such payment."

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into Court, the money is (so to say) converted into the subject of pre-emption, and so can no more be considered the property of the pre-emptor ;[14] finally

5.—Appeal.

(v) the pre-emptor's non-compliance with the terms of the decree and non-payment of the purchase-money do not affect his right of appealing from the decree : s. 528 H.

6.—Joint decrees.

(vi) Where there is a joint decree without any adjudication under O. 20, r. 14(2) of their respective rights, each plaintiff has the right to pre-empt the whole property.[15]

7.—Death : abatement.

(vii) If one of them dies pending an appeal and the appeal is allowed without his representatives being joined, the appeal abates as to that plaintiff, and he is entitled to possession if the pre-emption money in Court is paid over to the defendant with the consent of the surviving plaintiffs.[16]

8.—Partial pre-emption.

(viii) A stranger-purchaser cannot be required to submit to a partial pre-emption, nor is he entitled to demand it.[15]

(1) Position of buyer.

**551.**[16] The claim to pre-emption is not affected by the buyer's acts such as purporting to transfer or alienate the land, nor by his death ; provided that such acts take effect until the Court decrees the claim to pre-emption.[17]

*Illustration.*

If the buyer, B, purports to sell the land to BA, the pre-emptor can claim it either from B or BA ; and similarly, if B purports to make a gift or wakf of it, or to convert it into a mosque, or cemetary, or to let it on hire, the pre-emptor may annul the said acts.[18]

(2) Pre-emptor :

(i) Completed sale not affected by alteration or cancellation. Alteration of price.

**552.** After the completion of the contract of sale, alterations in, or additions to, or cancellation of, its terms, by the buyer and seller, do not affect the pre-emptor ;[19] provided that under Hanafi (but not Shia) law, where after the completion of the contract of sale—[20]

(1) the seller lessens the price, the pre-emptor is entitled to the benefit ; but (2) where the price is entirely remitted, the

[14] The money ceases to be pre-emptor's as soon as it is paid into Court, & so his creditors cannot attach it : *Abdus Salam* v. *Wilayat Ali*, (1897) 19 All. 256. See however *Sheo Gopal* v. *Najib Khan*, (1914) 36 All. 398 (trial Court decreed pre-emption : price deposited in Court by pre-emptor : decree reversed in appeal ; deposit attached by pre-emptor's creditor ; in second appeal trial Court's pre-emption decree restored, but on condition that amount taken away by attaching creditor be made good by pre-emptor since to that extent pre-emptor's debt discharged to his benefit).

[15] *Wajid Ali K.* v. *Puran Singh*, (1928) 56 I. A. 80 (ALL.).

[16] Sect. 551, & *ill.* cited & applied : *Muhammad Abdul Rehman Khan* v. *Md. Ayyub Khan*, (1924) 46 All. 889, 891. *Kamta Prasad* v *Mohan Bhagat*, (1909) 32 All. 45 (under *wajibu'l-arz*) ; *Khettar Chandra B. M.* v. *Nabin Kali D.*, (1913) 35 All. 385 (under custom).

[17] Bail. I. 497 (par. 2) (503-504) ; II. 185 (par. 2) ; Hed. 562 (col. i. par. 2).

[18] *Shankar Lal* v. *Hashmi B.*, (1932) 54 All. 1023.

[19] Bail. II. 185 (par. 2).

[20] Bail. II. 182-183, 184, (par. 3) ; *Bhadu Mahomed* v. *Radha Churn Bolia*, (1870) 4 Beng. L. R. (A.C.) 219 = *Bhodo Mahomed* v. *Radhu C.*, 13 W. R. 332. So that if purchaser subsequently agrees to pay higher price to seller, pre-emptor is not bound to pay enhancement, which must be "considered in law,.. a gift :" Bail. II. 183 (*ll.* 1-3) ; Hed. 555 (col. i. par. 3).

buyer has the benefit ;[21] and (3) where some defect is discovered in the property for which the seller agrees to compensate the buyer, the pre-emptor is entitled to the compensation.[22] SECTION 552. (ii) Defect in subject.

If the pre-emptor acquiesces in the sale, and then the seller and buyer agree to cancel it, the pre-emptor cannot (on the contention that the cancellation of the sale is a fresh transfer) claim to exercise the right of pre-emption.[23]

**553.** The buyer must (subject to ss. 553 A to E), give the land to the pre-emptor in the same condition in which it was when the seller gave possession thereof. (iii) Pre-emptor gets land in same state as purchaser.

**553 A.** Under Hanafi law, the pre-emptor has, subject to s. 553 D, the option of taking the land with the alterations or improvements, made by the buyer on payment of their value,[24] or of demanding that it be put back into its original state.[24] (iv) Improvements : alterations.

**553 B.** Where the subject of pre-emption [perishes or] becomes damaged after demand[25] by the pre-emptor, the pre-emptor has the option, on payment of the full consideration, of enforcing[25] his claim, or of waiving pre-emption ; provided that where the damage is caused by the act of the buyer he is responsible to the pre-emptor for the loss occasioned thereby.[26] (v) Deterioration of property.

**553 C.** Under Shia and Shafii texts, if prior to pre-emption being demanded,[25] the buyer plants trees or erects buildings on the land, (*a*) he has the option of removing them, and is not obliged to level the ground ; (*b*) and if he elects to remove them, the pre-emptor has the option of waiving his claim, or paying the full price for the land after they have been so removed ; (*c*) if the buyer declines to remove them, the pre-emptor has the option (i) of removing them himself, and paying to the buyer compensation for the loss if any that he may sustain ; or (ii) of taking possession of the whole and paying for them ; or (iii) of waiving the right of pre-emption.[27] (vi) Improvements in land.

[21] Hed. 555 (col. i. par. 2). [22] Bail. II. 187 (par. 4).

[23] Bail. II. 185 (*ll.* 1-5).

[24] Bail. I. 496 (502-503); Hed. 556 (col. ii. par. 2).

[25] Demanding & enforcing pre-emption as explained in s. 522(2)(*e*), p. 663, viz. as referring to *talab-i-ishhad* & *talab-i-tamlik*.

[26] Hed. 557 (col. ii. par. 2); Bail. II. 185, 186. There is amongst Shia authorities some dissent as to the proviso.

[27] Bail. II. 186 (par. 2, 3); Hed. 556 (col. ii. par. 2); Abu Yusuf's exposition of Hanafi law is to same effect.

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(vii) Cultivated land.

**553D.** Where the land has been cultivated, the pre-emptor must wait until the ripening of the crops, after which he must pay to the buyer the full price of the land without making any deduction for its rent during the said period.[28]

(viii) Compensation for pre-existing defect & subsequently discovered.

**553E.** If a defect existing in the land prior to the sale, is discovered after the sale, the pre-emptor has the option of avoiding the transfer to himself from the buyer. If the pre-emptor elects to avoid it, the buyer has the option either of avoiding the sale, or of demanding compensation, from the seller ;[29] and if the buyer elects to demand compensation, the pre-emptor has the option of pre-empting the property with an abatement in the price.[30]

V. Sale on credit : right of pre-emptor.

**554.** Where under the agreement for the sale the price is not payable until a specified time, the pre-emptor has—

(1) under Hanafi and Shia texts, the option of paying the price either immediately or at the specified time : in either case the land being transferred to him only when the price is paid ;[1] provided that (*a*) if the pre-emptor elects to pay the price immediately, and the land has prior thereto been already transferred to the buyer, and the sale completed, the buyer's right to defer payment of the price to the seller is not affected by the pre-emptor's election to pay the price immediately ;[2] (*b*) where the time when the price is payable is uncertain[3] [or unspecified] the pre-emptor has no such option to defer payment, but if he desires to exercise his right of pre-emption, he must pay it immediately ;[1]

Purchaser's right to defer payment to seller not affected by pre-emption.

(2) under Shafii texts the pre-emptor has the right of taking immediate possession of the land, and may delay payment of the price until the said specified time.[4]

*Illustration.*

Land is sold on the terms that the price is not to be paid for a year. The right of pre-emption is exercised : (*a*) the pre-emptor has the option of paying the price immediately or after a year ; (*b*) if he enforces his right of

[28] Bail. I. 496 (502-503) ; II. 188 (*fifth*) ; Hed. 557 (col. i. last 9 *ll.*) where it is stated that this is special exception to rule in s. 553A, p. 723.

[29] Bail. II. 192, 193 (*eighth*). See, however, with reference to these OPTIONS, Hed. 255, 258 (Bk. XVI., ch. iii, iv) : Baillie, *Muhammadan Law of Sale*.

[30] Bail. II. 187 (par. 4), 193 s. 8.

[1] Hed. 555 ; Bail. I. 491 (497) ; II. 190. Cf. s. 557, com., par. 6-8.

[2] Bail. I. 491 (497) ; Hed. 556 (col. i).

[3] As, for instance, if credit is given "till harvest," or "the treading out of the corn." Bail. I. 491 (497).

[4] Hed. 555 (col. ii. par. 3).

pre-emption after the land has been transferred to the buyer, the price must be paid to the buyer, not to the seller ; (*c*) if, after such transfer, the pre-emptor elects to enforce his claim, and pays the price immediately, then the buyer is not thereby bound to pay the price over to the seller until after the expiration of the year.[5] SECTION 554.

**555.** Where pre-emption arises from an exchange of the land (*a*) for some perishable object, which perishes,[6] or (*b*) where the object to be given in exchange is such that "there is no similar to it,"[7] in either case the pre-emptor may give to the seller the value of the object in lieu of it.[6] VI. Exchange of land : the consideration perishing.

## § 8.—Devices[8] for Evading Pre-emption.

**556.** Pre-emption is not favoured by the law,[9] and any device may be adopted (which is not fraudulent, or forbidden by any law for the time being in force), with the object of preventing the right of pre-emption from arising, or defeating the provisions of the law in favour of the pre-emptor.[10] PRE-EMPTION NOT FAVOURED BY THE LAW. Devices permissible.

Compare ss. 5, 522, 523, comm.

1.—Attitude of law towards pre-emption.

"The right of shufa is but a feeble right, as it is a disseising another of his property, merely in order to prevent apprehended inconveniences."[11] (This is stated to show why it is requisite that the shafi should without delay disclose his intention by making the demand,—which must be done in the presence of witnesses, otherwise it cannot be afterwards proved before the Kazi). In Madras pre-emption has been held to be opposed to justice, equity and good conscience (s. 5). Nevertheless, Imam Muhammad considered evasions abominable, Abu Yusuf, not taking that view. Mahmood, J., in an elaborate judgment,[12] says that though pre-emption operates as a restriction on free sale and thus tends to diminish the market value of property, yet it must have enough to recommend itself for even in the most civilized parts of Germany (this was said in 1885, more than half a century before the German destruction of Poland) a similar right (retractrecht) was maintained : that in India where distinctions of race, caste and creed prevail, the right must not be lightly dealt with ; since the intrusion of a stranger as a co-sharer must

2.—Defence by Mahmood, J.

[5] Bail. I. 491 (497). [6] Bail. I. 488 (par. 2).

[7] Bail. II. 183 (par. 3) : some Shia authorities hold that in such cases right drops.

[8] In Arabic *hila*, pl. *hiyal*.

[9] See s. 556, com. E.g. *Ajaib Nath* v. *Mathura Prasad*, (1886) 11 All. 164 ; *Ajodhya* v. *Sheo Shankar*, (1926) 2 Luck. 416.

[10] Bail. I. 504-506 (512-514) ; II. 196-197 ; Hed. 563 ; *Hamedmiya* v. *Benjamin*, (1928) 53 Bom. 525, 534.

[11] Hed. 550, cited in *Ram Charan* v. *Narbir Mahton*, (1870) 4 Beng. L. R. (A. C.) 216 = 13 W. R. 256. See *Dahyabhai* v. *Chunilal*, (1913) 38 Bom. 183, 187 ; *Nusrut Reza* v. *Umbul Khyr B.*, (1867) 8 W. R. 309 ; *Ali Muhammad* v. *Taj Md.*, (1876) 1 All. 283 ; *Kudratulla* v. *Mahini Mohun S.*, (1870) 4 Beng. L. R. (F. B.) 134 = 13 W. R. (F. B.) 21.

[12] *Gobind Dayal* v. *Inayatullah*, (1885) 7 All. 775 (F. B.) (*ad fin*).

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not only give rise to inconvenience but disturb domestic comfort, if not lead to breach of peace. Certain devices though considered abominable may have been allowed to defeat pre-emption : but Imam Muhammad, says Mahmood, J., "condemns all devices." The technicalities of the Muslim law of contract, procedure or evidence are not binding in India. If this is once conceded, he concludes, "it will be found that no 'tricks and artifices' can defeat the pre-emptive right in our Courts."

3.—Instances of devices.

The first six of the following devices are mentioned in the texts : [10] (1) transfer in the form of a hiba bil iwaz (not of a sale)[13] the land being nominally the subject of gift, and the consideration the iwaz ; [14] (2) giving a portion of the land to the purchaser, prior to sale,[15] by way of gift or sadaqa, demarcating or dividing it off [16] with a right of way thereto [17] common to the seller and purchaser ; (3) sale of trees on the land with their foundations to the purchaser, thus making him a co-owner of the land with priority over either a khalit or a neighbour ; (4) [ostensible statement of the consideration at a figure higher than that really agreed upon ; and subsequent composition of the price ostensibly agreed upon for an article of the value of the real price] ; [18] (5) [declaration that the sale is invalid or that it is with an option to the seller] ; (6) leaving unsold a strip of land along the boundary of the pre-emptor's land, so that his land actually does not adjoin the portion sold ; [19] (7) (the pre-emptor being a co-sharer) before a suit is brought for enforcing pre-emption, the buyer selling back the property to a co-sharer of the seller.[20]

## § 9.—PRE-EMPTION IN THE PUNJAB AND OUDH.

Pre-emption Act, 1913, Oudh Laws Act.

**557.** The Pre-emption Act (Punjab Act), I. of 1913 and Oudh Laws Act, XVIII. of 1876 regulate pre-emption in the provinces of Punjab and Oudh.

The main provisions of the two acts (hereinafter referred to as the Punjab Act & the Oudh Act respectively) are shortly stated below :—

1.—Pre-emption defined.

(1) The right of pre-emption is defined in the said Acts as a right (in the

[13] But note that under this device since *iwaz* must be agreed upon from start, viz. at time when the primary *hiba* made, the transaction would not be *hiba bil iwaz* but *hiba ba shartu'l iwaz* : & to that pre-emption would apply : ss. 523, *ill.* (1), 526.

[14] *Bashir Ahmad* v. (*Mt.*) *Zubaida K.*, (1925) 1 Luck. 83 (TRANSFER to wife IN LIEU OF MAHR called & held HIBA BIL IWAZ : *sed quaere* : s. 347, p. 351).

[15] *Chiragh Din* v. *Allah Din*, (1916) 51 Punj. Rec. 208 (No. 70) (transfer discovered to be really SALE, though DISGUISED AS GIFT : pre-emption allowed). *Muhammad Niaz K.* v. *Md. Idris K.*, (1918) 40 All. 322 (form of lease Rs. 250 paid down ; rent of 2 as. per year : issue being raised, Court *held* real nature of transaction sale : pre-emption allowed) ; but see *Ajodhya* v. *Sheo Shanker*, (1926) 2 Luck. 416.

[16] This necessary under Hanafi law : else gift void under doctrine of *musha*.

[17] Right of way makes grantee *khalit*, thus giving him priority over neighbour.

[18] But pre-emptor would be entitled to pre-empt on terms of real contract of sale, & not on ostensible or fictitious one : s. 528, e.g., p. 687, s. 530 B, p. 694.

[19] This device can defeat only neighbour ; besides it is imperfect, as it leaves strip undisposed of : Bail. I. 506, *n.*

[20] *Narain S.* v. *Parbat S.*, (1901) 23 All. 247. Contrast : *Kamta Prasad* v. *Mohan Bhagat*, (1909) 32 All. 45 ; *Khettar Chandra* v. *Nabin Kali*, (1913) 35 All. 385.

cases specified) of the persons therein mentioned or referred to, to acquire in preference to other persons, immovable property. In the Punjab Act the right is restricted (*a*) (in case of sales), to acquiring agricultural land, or village immovable property or urban immovable property, (*b*) (in case of mortgagees) to foreclosing the right to redeem village or urban immovable property.[21] The right is exercisable and enforceable in accordance with terms laid down in Acts, (which in certain respects recognize custom). SECTION 557.

2.—Presumption.

(2) The right of pre-emption (*a*) is presumed to exist in all village communities, and to extend to the village site and the houses and lands within the village boundaries; and (*b*) may be shown by evidence to exist by local custom in any town or city.

3.—Priorities amongst pre-emptors.

(3) In respect of a sale or foreclosure of a proprietary or under-proprietary tenure or a share in such tenure, the Oudh Act, s. 9 provides for priorities as follows: 1stly, co-sharers of a sub-division, in the order of the relationship to the vendor or mortgagor; 2ndly, co-sharers of the whole mahal, in the same order; 3rdly, any member of the village community; 4thly, if the property be an under-proprietary tenure, the proprietor. The Punjab Act provides for priorities in great detail under 16 heads: ss. 15, 16.

4.—Several pre-emptors.

(4) Where two or more persons are equally entitled to pre-empt, the person to exercise the right are under the Oudh Act, s. 9, to be determined by lot. Cases where several pre-emptors are found by the Court to be equally entitled to the right of pre-emption, are in the Punjab Act, s. 17, provided for under 5 heads.

5.—Notice of sale or foreclosure by seller or mortgagor.

(5) Under the Punjab Act, s. 19 and Oudh Act, s. 10, notice of the sale or foreclosure, together with a statement of the price at which the owner is willing to sell, or of the amount that is due for redemption, must be given to the persons who have the right to pre-empt, through the Court within the local limits of whose jurisdiction the property or any part thereof is situate.

6.—Notice of intention to pre-empt.

(6) The right to pre-empt is lost or extinguished unless, within 3 months of the notice to the pre-emptor of the sale or foreclosure, he deposits in, or presents to, the Court a notice (of his intention to pre-empt),[22] for service on the vendor or mortgagor: Punjab Act, s. 20; Oudh Act, s. 11. Under the

[21] (A) Under Punj. Act, ss. 3, 4, 5, 23, 24, PROPERTY WITH REFERENCE TO PRE-EMPTION is CLASSIFIED under 3 main heads: (i) agricultural land,—as to which pre-emption is exercisable only in case of sales, & only provided that the sale is not in contravention of the Punjab Alienation of Land Act, XIII. of 1900, & provided also that pre-emption is not debarred by s. 14 of said Act; (ii) village immovable property,—(pre-emption exercisable in cases either of sale, or foreclosure of right to redeem); (iii) shop, sarai, or katra; or dharmsala, mosque or other similar building, (no right of pre-emption exists in respect of these); (B) Following particulars also laid down: (i) pre-emption in regard to AGRICULTURAL LAND & village immovable property is subject to provisions & limitations of Punj. Act, I. of 1913; (ii) pre-emption in respect of URBAN IMMOVABLE PROPERTY in any town exists only when custom of pre-emption proved to exist at time of commencement of said Act, viz. 14th Mar. 1913; (iii) no pre-emption exists within any CANTONMENT, unless notified by Local Government in cases of agricultural land; (iv) nor in respect of SALE BY or to (*a*) GOVERNMENT, or (*b*) by or to any LOCAL AUTHORITY, or (*c*) to any COMPANY under Land Acquisition Act, 1894, part VII. or (*d*) in respect of any sale sanctioned by the DEPUTY COMMR. under Punj. Alien. of Land Act, XIII. of 1900, s. 3(2). See p. 710, *n.* 4.

[22] For particulars to be contained in notice of intention to pre-empt, see par. (9)

SECTION 557. Punjab Act, s. 20, the Court may allow further time not exceeding a year, for the notice of intention to pre-empt.

7.—Payment by pre-emptor.

(7) As an alternative to the notice of intention to pre-empt the pre-emptor may under the Oudh Act, ss. 11-13 pay or tender (*a*) to the seller, the price, or the fair market value, of the property, or (*b*) to the mortgagee or his successor in title, the amount specified in the notice of foreclosure, or the amount really due for redemption on the footing of the mortgage.

8.—Deposit in Court.

(8) Under the Punjab Act, s. 22, the Court shall, before the settlement of issues in a suit for pre-emption, require the plaintiff to deposit 1/5 of the probable value of the land or property, or give security for such probable value. The same powers may be exercised by the Appellate Court.

9.—Real bona fide consideration.

(9) The pre-emptor may contend that the price at which the sale purports to have taken place, or the amount that is claimed for redemption, has not been paid, or not fixed, or not claimed, in good faith. The Punjab Act, s. 20, requires that the pre-emptor shall, in the notice of his intention to pre-empt, state whether he accepts, or does not accept, as correct the price for sale or amount due for redemption, stated in the seller's or mortgagor's notice of sale or foreclosure : and if the pre-emptor does not accept the statement as correct, to state what sum he is willing to pay.

10.—Court to determine real price or amount of mortgagee's claim.

(10) The Court under the Punjab Act, ss. 26, 27, 28 shall in such cases determine whether the price for the sale was paid, or was fixed in good faith, or the amount claimed by the mortgagee for redemption is claimed in good faith ; and if it finds that the price or amount was not so fixed or paid or claimed, or that the amount claimed for redemption was not due, or, though due, was not claimed in good faith, it shall fix as the price, for the purposes of the suit for pre-emption, the market value ; and for determining the market value, it may consider as evidence of value : (*a*) the price or value actually received, or the amount really due, (*b*) the amount of interest included in such price or value or amount, (*c*) the annual net assets, (*d*) the land revenue, (*e*) the value of similar land or property, (*f*) previous sales or mortgages.

11.—When price consists of debt exceeding market value of property.

(11) Under the Punjab Act, s. 25 when the price at which the sale purports to have taken place represents entirely or mainly a debt greatly exceeding in amount the market value of the property, the Court shall fix the market value as the price of the land or property, for the purposes of the suit ; and may put the vendor to his option either to accept such value as the full equivalent of the consideration for the original sale, or to have the said sale cancelled, and the vendor and vendee restored to their original position.

12.—Suit to enforce pre-emption.

(12) When the sale or foreclosure has been completed, the person entitled to pre-empt may under the Punjab Act, s. 21 bring a suit to enforce that right. The Oudh Act, s. 13 mentions 4 grounds on which a suit may be brought, viz. (i) notice due under s. 10 not given ; (ii) refusal of tender made under s. 11 or 12 ; (iii) price of sale not fixed in good faith ; (iv) amount claimed by mortgagee not really due, and not claimed in good faith, and in excess of market value of property mortgaged.